(25,728)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 378.

NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

LEO F. DODGE.

IN ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

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1 In the Springfield Court of Appeals.

No. 1876.

LEO F. DODGE, Respondent (Plaintiff),

vs.

NEW YORK LIFE INSURANCE COMPANY, Appellant (Defendant).

Præcipt for Transcript.

To the Clerk of the Springfield Court of Appeals:

You will please prepare a transcript of record upon the writ of error allowed on the 29th day of December, 1916, in the above entitled cause, for review by the Supreme Court of the United States, and include in such transcript the following papers:

A complete copy of the record on appeal from the trial court and filed in your office, and upon which said cause was determined in the Springfield Court of Appeals, State of Missouri, including certified copy of judgment appealed from, the abstract of the record as prepared by appellant and respondent's additional abstract of the record found on pages 2 to 8 inclusive of "Respondent's Additional Abstract and Brief."

You will also include in this transcript of the record the following:

2 1. Copy of appellant's assignment of errors in the Springfield Court of Appeals, as set forth on pages 6 and 7 in appellant's brief filed in the Springfield Court of Appeals.

2. Copy of Appellant's motion filed in the Springfield Court of Appeals to transfer this cause to the Supreme Court of Missouri.

3. Copy of the opinion of the Springfield Court of Appeals in this cause.

4. Copy of the petition of the New York Life Insurance Company to the Supreme Court of Missouri for a writ of mandamus to transfer this cause to the Supreme Court of Missouri.

5. Certified copy of the order of the Supreme Court of Missouri, denying the application of the New York Life Insurance Company for a writ of mandamus to transfer this cause to the Supreme Court of Missouri.

6. The original assignment of errors with prayer for reversal filed with the petition for writ of error from the Supreme Court of the United States.

7. The original petition for writ of error from the Supreme Court of the United States, together with the order of allowance.

8. Copy of supersedeas bond and of order approving same.

9. The original writ of error with the certificate of allowance thereof.

10. Your certificate of the lodgment of copy of writ of error from the Supreme Court of the United States for use of the defend-
3 ant in error and the lodgment of original bond.
11. The original citation with service thereof.
12. Your certificate of the authentication of the record.
13. Your return to writ of error and statement of costs.

JAMES C. JONES,
Attorney for Appellant (Plaintiff in Error),
New York Life Insurance Company.

The undersigned, counsel for Leo F. Dodge, respondent (defendant in error) hereby acknowledges service of a copy of the foregoing præcipe for transcript this 3rd day of January 1917.

LORTS & BREUER, &
JAMES J. O'DONOHOE,
Counsel for Leo F. Dodge, Respondent
(Defendant in Error).

4 In the Springfield Court of Appeals, State of Missouri.

Be it remembered, that on June 21st 1916, there was filed in the office of the Clerk of this Court, a certified copy of a judgment and order allowing an appeal from the circuit court of Phelps County, Missouri, in a certain cause wherein Leo F. Dodge was Plaintiff-Respondent and New York Life Insurance Company, Defendant-Appellant, which said short form transcript is in words and figures as follows:

STATE OF MISSOURI,
County of Phelps, ss:

May Term, A. D. 1916.

In the Circuit Court of said County, on the 4th day of May A. D. 1916, the following, among other proceedings, were had, viz:

LEO F. DODGE

vs.

NEW YORK LIFE INSURANCE CO.

Suit on Insurance Policy.

Now at this day this cause coming on to be heard, Plaintiff appearing in person and by counsel and defendant by counsel and announce ready for trial; and a jury being waived, the issues are submitted to the Court who proceeds to hear the evidence, and after hearing the evidence, and all the matters herein being seen, heard and by the Court fully understood, the Court doth find the issues for the plaintiff and assess her damages in the sum of Nineteen hundred

eighty-three and 45/100 Dollars ($1,983.45), together with an Attorney fee in the sum of Two hundred fifty Dollars, ($250.00).

It is therefore considered and adjudged by the Court that the plaintiff, Leo F. Dodge have and recover of and from the Defendant, The New York Life Insurance Company, the said sum of Nin-teen hundred eighty-three & 45/100 dollars damages, together with Two hundred dollars Attorney's fee, with interest on said sums at the rate of six per cent per annum from date hereof, together with all costs in this behalf laid out and expended and that execution issue therefor.

LEO F. DODGE

vs.

NEW YORK LIFE INS. CO.

Suit on Insurance Policy.

Now at this day comes the defendant herein by its Attorney and files its application and affidavit for an appeal in said cause,
5 which said application and affidavit for an appeal being taken up, considered and found to be sufficient, it is ordered by the Court that the defendant be allowed an appeal to the Springfield Court of Appeals.

STATE OF MISSOURI,
County of Phelps, ss:

I, Will R. Ellis, Clerk of the Circuit Court, in and for said County, hereby certify the above and foregoing to be a true copy of the Judgment & Order granting appeal, proceedings of our said Circuit court, on the day and year above written, as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at office in Rolla, Mo., this 20th day of June, A. D. 1916.

[SEAL.]

WILL R. ELLIS,
Clerk of Circuit Court.

6 Every page of this record is numbered by adding 5 to each page as printed on the page.

In the Springfield Court of Appeals, October Term, 1916.

No. 1876.

LEO F. DODGE (Plaintiff), Respondent,

v.

NEW YORK LIFE INSURANCE COMPANY (Defendant), Appellant.

Appeal from the Circuit Court of Phelps County Missouri.

Hon. L. B. Woodside, Judge.

Appellant's Abstract of Record.

This is an action on a policy of insurance issued by the New York Life Insurance Company on the life of Josiah B. Dodge, in which the plaintiff is designated as the beneficiary.

7–10 *Pleadings.*

Omitting the caption and signature, respondent's petition filed on the 27th day of January, 1915, was as follows:

* * * * * * *

11 *Answer.*

(Omitting Caption and Signatures.)

Now comes the defendant, New York Life Insurance Company, and for answer to the plaintiff's petition, says:

1. Defendant denies each and every allegation in the plaintiff's petition contained except the allegations hereinafter expressly admitted to be true.

12 2. The defendant admits that said defendant now is, and was, at all the dates in said petition mentioned, a corporation duly organized and incorporated under and by virtue of the laws of the State of New York, and in that behalf avers that said defendant is organized and incorporated for and engaged in the business of making insurance upon lives and every insurance pertaining to life, having its principal office and place of business in the City of New York, in the State of New York, and that said corporation has no capital stock, but is a purely mutual company, and it is doing, and always has done, said business on the purely mutual plan.

3. The defendant admits that the said Josiah B. Dodge made written application to this defendant for a policy of insurance on his life, and that pursuant thereto the defendant issued its written policy of insurance No. 2054961, and in that behalf alleges that

it was provided in and by the terms of said application and in said policy contract that the contract contained in said policy and in said application should be construed according to the laws of the State of New York, the place of said contract being agreed to be the Home Office of said company in the City of New York, in the State of New York; that said policy was made in consideration of the sum of $69.95 paid on, to-wit, the 20th day of October, 1900, and of the payment of a like sum on the 20th day of January, April, July and October in every year during the continuance thereof until twenty full years' premiums should thereby be paid. It was further agreed in and by the terms of said policy contract that the premiums thereon were due and payable at the defendant's said Home Office and that if any premium was not paid on
13 or before the day when due or within the month of grace which was allowed by said contract for the payment of premiums, the liability of the company should be only as in said policy contract provided for in such case. It was further provided in and by the terms of said policy that the insured could obtain from this defendant cash loans on the sole security of said policy on demand at any time after said policy had been in force two full years, if premiums had been duly paid to the anniversary of the insurance next succeeding the date when the loan was made, the application for any loan to be made in writing to the Home Office of the defendant and the loan to be subject to the terms of the defendant's loan agreement. The defendant admits that the insured paid the premiums on said policy until the 20th day of October, 1907, and that he there and then discontinued the payment of further premiums and in that behalf alleges that that premium on said policy that became due and payable on the 20th day of October, 1907, was never paid, nor was any part thereof ever paid, and that said policy there and then lapsed for the non-payment of said premium.

4. On, to-wit, the 9th day of November, 1906, said plaintiff, who was named as the beneficiary in said policy, and said insured, pursuant to the provisions of said policy providing for loans on the sole security thereof, duly made written application to this defendant at its Home Office in the City of New York for a cash loan of $1,350 on the security of said policy, and said defendant there and then, at its said Home Office in the City of New York, duly accepted said application and made said loan, and thereupon said plaintiff and said Josiah B. Dodge there and then, as evidence of said loan, and of the terms upon which it was made and
14 to secure its repayment, duly made and delivered to said defendant at its said Home Office in the City of New York, their policy loan agreement, by the terms of which they agreed to, and did, pledge and deposit said policy with said defendant at its said Home Office as collateral security for said loan, and agreed to pay interest on said loan at the rate of 5 per cent per annum, payable in advance, and further in and by said loan agreement agreed that said loan should become due and payable either if any premium on said policy or any interest on said loan was not paid

on the date when due, in which event said pledge should, without demand or notice of any kind, every demand and notice being thereby waived, be foreclosed by satisfying said loan in the manner provided in said policy. It was further in and by said policy loan agreement agreed between said parties, and the fact was, that the application for said loan was made to the said defendant at its said Home Office in the City of New York, was accepted, the money paid by it and said loan agreement made and delivered there, and that said principal and interest were payable at said Home Office, and that said contract was made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said company; that said defendant duly paid to said borrowers said sum of $1,350, so applied for by them, and received and accepted at its said Home Office in the City of New York said policy loan agreement and said policy as a pledge to secure the repayment of said sum.

5. No part of the premium on said policy or of the interest on said loan that became due on the 20th day of October, 1907, ever was paid. It was provided in and by the terms of said policy
15 that "If any premium or interest due after the first two insurance years is not duly paid, and if there is an indebtedness to the company, this policy will automatically continue for such amount of paid-up insurance as any excess of the reserve held by the company over such indebtedness will purchase according to the company's present published table of single premiums." The reserve held by the defendant on said policy at said time of the non-payment of the said October 20, 1907, premium and interest was the sum of $1,348.85, and the amount there and then due on account of said indebtedness was said sum of $1,350, with interest, so that there was no excess of said reserve over said indebtedness and no sum whatsoever for the purpose of purchasing insurance benefits after the lapse of the policy for the non-payment of said premium with said indebtedness against it.

6. Thereupon said defendant, pursuant to the terms of said policy and loan agreement, and after said lapse of said policy for the non-payment of said premium and interest, there and then at its said home office duly foreclosed said pledge and satisfied said loan in full by deducting it from said reserve held by said defendant on said policy and canceled said indebtedness, and thereupon said policy thereafter had no value; that after said foreclosure, and on, to-wit, the 17th day of December, 1907, said defendant duly mailed to said Josiah B. Dodge at his post office address, No. 4952 Maryland avenue, St. Louis, Missouri, a letter advising him that on account of the said non-payment of the said October 20, 1907, premium and interest, the principal of said loan became due and that said loan had been settled according to the terms of the policy and the policy had no further value. Said insured duly received said
16 notice on, to-wit, the 19th day of December, 1907, and there and then duly assented to said transaction.

The sum so paid by said defendant for said policy, to-wit, said settlement and satisfaction of said indebtedness thereon, with in-

terest, was a reasonable, fair and just surrender value therefor and all said policy was reasonably worth; and upon information and belief said defendant says said surrender value so paid by said defendant, which said insured there and then received as aforesaid, was satisfactory to said plaintiff and said insured. Said indebtedness on said policy at said time of its lapse as aforesaid and of said foreclosure of said pledge, with interest, exceeded by a small sum the amount of the reserve held by said defendant under said policy. After said satisfaction of said indebtedness out of the reserve on said policy as aforesaid and said notice thereof to said insured, neither said insured nor said plaintiff, nor any other person, ever admitted or recognized any indebtedness to said defendant in any sum whatever on account of said policy or of said loan, but they each and all, as well as this defendant, then and thereafter at all times understood said indebtedness to be and it was and they each treated it as fully paid and satisfied, as aforesaid, out of the reserve on said policy, and they each and all there and then, and at all times acquiesced in said foreclosure of said pledge and said settlement and satisfaction of said indebtedness and received, accepted and retained all the benefits thereof, and therefore they ought to be and in equity they are estopped now to question said transaction and the validity thereof and of every part thereof.

7. Said defendant further says, upon information and belief, that said contract of pledge and said foreclosure thereof was
17 not a Missouri transaction, but was contract of the State of New York and said transaction was in all respects in accordance with the laws of said State of New York. Nevertheless, said defendant is, and for more than fifty years last past has been, a citizen of the United States and of the State of New York, to-wit, a corporation duly organized and existing under and by virtue of the laws of the State of New York for the purpose of transacting the business of life insurance, and the said plaintiff and said insured were during all the time herein mentioned citizens of the United States and of the State of Missouri; that that part of the Revised Statutes of Missouri, 1899, known as section 7897, which provides "that in the event of non-payment of premium after the payment of three annual premiums the net value of the policy when the premium becomes due and is not paid shall be computed upon the Actuaries' or Combined Experience Table of Mortality with 4 per cent interest per annum and after deducting from three-fourths of said net value any notes or other evidence of indebtedness to the company given on account of past premium payments on said policies issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy," as construed by the courts of Missouri, and especially as construed in the several cases of Smith v. The Mutual Benefit Life Co., 173 Mo. 329, and in Burridge v. New York Life, 211 Mo. 158, and in Head v. New York Life, 241 Mo. 403, is unconstitutional and void for the several reasons following, that is to say: Said part of said statute as so construed fails to give full faith and credit to

acts and transactions lawfully done in the State of New York
18 and therefore it is contrary to and in violation of Article IV, Section 1 of the Constitution of the United States, and abridges the privileges and immunities of this defendant as a citizen of the United States and of the State of New York, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Article IV, Section 2 of the Constitution of the United States, and deprives the parties to said contract of their liberty and property without due process of law, contrary to and in violation of Article V and Section 1 of Article XIV of the Amendments to the Constitution of the United States, and impairs the obligations of said several contracts of insurance, loan and pledge duly made between said parties and performed by them, and therefore is contrary to and in violation of Article I, Section 10 of the Constitution of the United States.

8. At the time said Dodge applied for said policy there was, and there still is, a law of the State of New York known as Section 89 of Chapter 690 of the Laws of New York, 1892, which provided as follows:

"Sec. 89. Discriminations Prohibited.—No life insurance corporation doing business in this State shall make any discrimination in favor of individuals of the same class or of the same expectation of life either in the amount of premium charged or in any return of premium, dividends or other advantages. No agent of any such corporation shall make any contract of insurance or agreement as to such contract other than that which is plainly expressed in the policy issued."

And there is also a similar law in the State of Missouri.

19 Said policy No. 2054961 on the life of said Dodge was made by said defendant on its regular policy form for insuring lives on the twenty-year endowment plan and said policy was one of a very large number of similar policies made and delivered by said defendant to individuals of the same class or of the same expectation of life as the said insured under said policy 2054961. Said several policies made on said form and in said class or expectation of life were made and delivered by said defendant to policy-holders in every locality in which the defendant did business, to-wit, all over the civilized world.

Each and all of said policies provided, as does said policy No. 2054961, for loans, and pursuant to the said loan provision thereof, and defendant from time to time made to many of its said insured several loans on their said policies and received as evidence thereof their respective loan contracts on the same loan agreement form or in substance and effect the same form, as in the case of said loan made on said policy 2054961, and many of said loans so made were settled in the same way in which said loan to said insured under said policy 2054961 was settled as aforesaid, and none of said policies contained any provision such as that provision contained in said Non-Forfeiture Law of Missouri, as construed by the courts of Missouri in the decisions aforesaid and relied upon by the plaintiff, but they each and all contained the provisions that said policy

2054961 contains, if said law of Missouri is excluded therefrom, and gave the insured thereunder the benefits and only the benefits said policy gives by its terms as written by the defendant and unchanged and uninfluenced by the laws of any place except the laws of New York, subject to which each and all of said insurance contracts
20 was made. If the defendant is compelled to read into said policy said Non-Forfeiture Law of Missouri as construed by the courts of the State of Missouri in the decisions aforesaid, then said policy as so changed by said Missouri law will discriminate between said insured named in said policy and other individuals insured by the said defendant of the same class or of the same expectation of life in the benefits and advantages given by said policy, in violation of said anti-discrimination law of New York and said like law of Missouri and in violation of the principle of mutuality upon which alone the defendant is authorized by its corporate charter to transact the business of life insurance.

Wherefore, said defendant, having fully answered, prays that it may go hence with its costs.

Reply.

(Caption and Signature Omitted.)

Now comes Leo F. Dodge, the plaintiff in the above-entitled cause, and for her reply to the answer of defendant filed herein, admits that defendant is a New York corporation engaged in the insurance business, admits that defendant issued the policy in suit, and that the plaintiff is the designated beneficiary therein; admits, too, that the insured and plaintiff applied for and secured the loan mentioned in said answer; admits, also, that on or about the 17th day of December, 1907, said defendant duly mailed to Josiah B. Dodge, the insured, at his post office address, No. 4952 Maryland avenue, St. Louis, Missouri, a letter advising him that on account of the said non-payment of the October 20th, 1907, premium and loan interest, the principal
21 of said loan became due and that said loan had been settled according to the terms of the policy and the policy had no further value; admits that the insured received said letter on or about the 19th day of December, 1907, but plaintiff denies that either she or the insured assented to said transaction in any manner whatsoever.

For further reply to defendant's said answer, plaintiff states that Josiah B. Dodge, the insured, made written application to defendant in the City of St. Louis, State of Missouri, for the policy in suit, and said policy was issued thereon and delivered to him, and all premiums were paid thereon in said city and State, and hence said policy is a Missouri contract and governed by the laws thereof, and the same was known or should have been known to defendant herein at the time it issued said policy. That all loan applications and loan agreements made by the insured and plaintiff, or either of them, were so made in the City of St. Louis, Missouri, and so much of the proceeds of said loans as were paid to the insured or plaintiff were so paid to them in the City of St. Louis, Missouri, and so much of said loans

as were applied to pay premiums were thus applied in said City of St. Louis, Missouri, and accordingly said applications and loan agreements, and the entire transactions, are Missouri contracts and governed by her laws and the same was either known or should have been known to defendant at the time said loans were made.

That said policy contains no stipulation for foreclosure in case of a default in the payment of a loan, when the same, as in the instant case, amounts to or exceeds the reserve value of said policy.

That the applications and loan agreements attempting to
22 pledge the reserve or net value of said policy are void because in conflict with Section 7897 of the Revised Statutes of the State of Missouri, 1899; that the alleged foreclosure sale, the alleged cancellation and settlement of the loan indebtedness as well as the alleged appropriation of the reserve under said policy to repay said loan, as stated in defendant's said answer, are all illegal, void, and of no force or effect, and the entire proceedings are contrary to and in conflict with the laws and statutes of the State of Missouri in such cases made and provided.

Plaintiff further states that no part of Section 7897, Revised Statutes of the State of Missouri, 1899, is void or unconstitutional; to the contrary, it has been decided by the Supreme Court of the United States in Cravens v. New York Life Insurance Company, 178 U. S. 389, that said section is valid and constitutional; that the construction of said sections by the courts of Missouri in the cases of Smith v. Mutual Benefit Life Co., 173 Mo. 329, and in Burridge v. New York Life, 211 Mo. 158, and in Head v. New York Life, 211 Mo. 403, is constitutional and valid, and that said statute as thus construed does not fail to give full faith and credit to acts and transactions done in the State of New York, nor abridge the privileges or immunities of defendant nor deprive the parties to the contract of insurance of their property without due process of law, nor impair the obligations of either the contract of insurance, loan agreements or pledge contract, but, on the contrary, the interpretation by the Missouri courts is sound and binding on the Supreme Court of the United States, as was decided in the case of Cravens v. New York Life, 178 U. S. 389, and formed part of the consideration and became a constituent element of the policy in suit.

23 Plaintiff further states that the State of Missouri has enacted no special law for the benefit of defendant, and if the said defendant has been issuing policies beyond the limits of Missouri, not conforming to the laws of Missouri, neither the State of Missouri, nor plaintiff herein, have any concern with the same; that no invitation has been extended to defendant to carry on the insurance business in Missouri, and it is at liberty to cease business in Missouri at any time it pleases; that the said defendant has been violating the laws of Missouri and defying the courts thereof ever since it was suffered to begin business therein, and it is now time that said defendant should see the error of its way and thus comply with the laws of the said State of Missouri.

Plaintiff further states prior to the death of the insured the defendant notified the insured that the policy had no value on account

of the failure to repay the loan and interest thereon, and after the insured's death the said defendant disclaimed all liability under said policy for reasons other than failure to make claim and furnish proofs, of death, thereby dispensing with claim and proofs of death and waiving the same.

Wherefore, having fully replied, plaintiff prays that all provisions of said policy, together with all conditions of said loan agreements, as well as all of defendant's proceedings, contrary to and in conflict with the laws of the State of Missouri, be for naught held, and that plaintiff have judgment, as in her petition prayed.

Trial.

The trial was had May 4, 1916, and during the May, 1916, Term, before the Court without a jury, jury having been waived.

24

Judgment.

On the 4th day of May, 1916, and during the May, 1916, Term of court, judgment was rendered against the defendant in favor of plaintiff for $2,233.45.

Motion for New Trial.

On the 4th day of May, 1916, and during the May, 1916, Term of Court, within four days after the rendition of judgment, defendant filed its motion for new trial, which said motion was on the same day overruled, to which action defendant duly excepted.

Appeal.

On the 4th day of May, 1916, and during the May, 1916, Term of court, appellant was granted by the Court one hundred and twenty days from May 4, 1916, within which to file its bill of exceptions. Appellant filed its affidavit for appeal in statutory form on said 4th day of May, 1916, which being approved, appellant asked that an appeal be allowed it to the Supreme Court of Missouri for the reason that constitutional questions were involved in the case. The Court refused to allow an appeal to the Supreme Court of Missouri, to which ruling the appellant duly objected and excepted, and granted an appeal to the Springfield Court of Appeals. Appellant's affidavit for appeal is as follows:

25 *Affidavit for Appeal.*

STATE OF MISSOURI,
County of Phelps, ss:

In the Circuit Court of Phelps County, May Term, 1916.

LEO F. DODGE, Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, Defendant.

STATE OF MISSOURI,
County of Phelps, ss:

James C. Jones, Jr., attorney and agent for New York Life Insurance Company, defendant here, being duly sworn, makes oath and says, that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the Judgment or decision of the Court.

JAMES C. JONES, JR.,
Attorney and Agent for New York Life Insurance Company.

Subscribed and sworn to before me this 4th day of May, A. D. 1916. My commission expires March 3, 1919.

[SEAL.] EDWARD W. LAKE,
Notary Public.

The appellant, within the time therefor allowed, to-wit, on the 13th day of June, 1916, filed its bill of exceptions, the same having
26 been approved, read, signed and sealed by the trial judge, which bill of exceptions (omitting caption) is as follows:

Bill of Exceptions.

Be it remembered, that heretofore, to-wit, at the May Term, 1916, of the Circuit Court of Phelps County, Missouri, on the 4th day of May, 1916, this cause coming on to be heard and plaintiff appearing in person by her attorneys, J. J. O'Donohoe and Lortz & Breuer, and defendant appearing by its attorneys, James C. Jones, and both parties announcing ready for trial, the following proceedings were had in said cause:

Plaintiff's Evidence.

The defendant objects to the introduction of any evidence under the petition in this cause, because it affirmatively appears from the allegations of said petition that the policy sued on herein was issued October 20th, 1900; that said policy lapsed for the non-payment of

the premium due October 20th, 1907; that the insured died February 12th, 1912; that at the time of the lapse of said policy for the non-payment of the premium due October 20th, 1907, there was an outstanding indebtedness or loan on said policy amounting to $1,350.00; that said policy had been pledged to the defendant company to secure the repayment of said loan; that the reserve on said policy on October 20th, 1907, computed by the actuaries' or combined experience table of mortality, with four per cent interest per annum, amounted to $1,251.25, and that three-fourths of said reserve amounted to $942.94; that it conclusively appears from the plaintiff's petition that the plaintiff is basing his right to a
27 recovery in this case under Section 7897, R. S. Mo. 1899, which, as construed by the courts of Missouri, provides that upon the lapse of such policy for the non-payment of any premium subsequent to the third, three-fourths of the reserve thereof, computed upon the actuaries' or combined experience table of mortality with four per cent interest per annum after deducting only that indebtedness outstanding on the policy at the time of its lapse which had been given on account of past premiums shall be applied as a net single premium to the purchase of extended insurance; that Section 7897, R. S. Mo. 1899, as construed by the courts of Missouri, as permitting the deduction of only the outstanding indebtedness on the policy at the date of its lapse for the non-payment of any premium subsequent to the third which had been given on account of past premium payments on the policy from three-fourths of its reserve in arriving at the balance to be paid as a net single premium to the purchase of extended insurance, is unconstitutional and void for the following reasons, to-wit:

First. Because it denies to the defendant company the equal protection of the laws, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Second. Because it deprives the defendant of its property without due process of law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution.

Third. Because it deprives the defendant company of its liberty, contrary to and in violation of Section 1 of the Fourteenth Amendment of the Federal Constitution.

Which objection was by the Court overruled; to which
28 action of the Court in overruling defendant's objection the defendant, in open court, by counsel, objected and excepted at the time.

Mrs. LEO F. DODGE, being duly sworn, in her own behalf testified as follows:

Direct examination.

By Mr. O'Donohoe:

My name is Leo Fleming Dodge; I reside in St. Louis, Missouri. I formerly lived in Sedalia, Missouri. Josiah B. Dodge, the insured under the policy in suit, was my husband. My husband died

February 12, 1912; he resided in the State of Missouri. The application for the policy in suit marked "Ballard's Exhibit A" was made in the City of St. Louis, Missouri. The signature to Ballard's Exhibit "B" is that of Josiah B. Dodge; it was signed in St. Louis, Missouri. The policy sued on was delivered to my husband in St. Louis, Missouri. My husband signed Ballard's Exhibit "D" in the City of St. Louis, Missouri. Ballard's Exhibit "E," which is entitled "Policy Loan Agreement," was signed in St. Louis, Missouri. My husband signed and cashed check marked "Ballard's Exhibit F" at the Missouri Trust Company in St. Louis. My husband and myself signed Ballard's Exhibit "G" in St. Louis. My husband signed the policy loan agreement dated November —, 1904, entitled Ballard's Exhibit "H," in St. Louis, Missouri. My husband and myself signed Ballard's Exhibit "I" in St. Louis Missouri. My husband cashed the check marked "Ballard's Exhibit J" in St. Louis, Missouri. My
29 husband signed Ballard's Exhibit "K" in St. Louis Missouri. My husband signed Ballard's Exhibit "L" in St. Louis, Missouri. My husband and myself signed Ballard's Exhibits "M" and "N" in St. Louis, Missouri. My husband signed Ballard's Exhibit "O" in St. Louis, Missouri. My husband and myself signed Ballard's Exhibit "P" in St. Louis, Missouri. I saw the original of Ballard's Exhibit "Q," which is a letter from John C. McCall, secretary, to Mr. Josiah B. Dodge. I did not make claim after my husband's death on this policy; when we received this letter from Mr. McCall because we took it for granted that everything was canceled and nothing more was due us; we relied on this letter, and we would have made claim if it had not been for this letter. I have never been in the City of New York; my husband has never been in New York. All the premiums on this policy were paid in St. Louis; all the transactions concerning policy and loans were had in Missouri; all the premiums were paid in Missouri. My husband died in Missouri.

Plaintiff then offered in evidence H. G. SELLMAN's deposition, which is as follows:

My name is H. G. Sellman. I am familiar with Sections 7897, 7898 and 7899 of the Revised Statutes of Missouri for 1899. I am able to make a computation of the net value of a policy on any plan under said sections and figure the extended insurance as provided by said sections. Policy in suit, photograph of which you have just shown me, is a twenty-year endowment, twenty-year accumulation plan. I am familiar with the actuaries' or combined ex-
30 perience table of mortality. Calculating the net value of the policy on the twenty-year endowment, twenty-year accumulation plan, according to that table, the following factors enter into the calculation: It is necessary to have the age at issue, the amount of insurance, and the period for which premiums have been paid; with this information, and by referring to the tables contained in the Principles and Practice of Life Insurance, 7th Edition, I can compute the net value of such policy. The net value of a policy for $5,000.00 on the life of a man aged thirty-six at the time of issuance,

the policy being a twenty-year endowment, twenty-year accumulation policy, upon which premiums have been paid for seven years and the lapse occurs after the payment of the seven years' premiums, computed on the actuaries' or combined experience table of mortality, with 4 per cent interest per annum, as shown on page 401 of the 7th edition of the Principles and Practice of Life Insurance, is $1,257.25; three-fourths of $1,257.25 is $942.94; $942.94 is sufficient to continue the insurance for thirteen years, to the end of the endowment period of the policy, and to purchase an additional pure endowment for $507.67. Deducting $668.05 from three-fourths of the net value of the policy at the date of lapse, or $942.94 leaves $274.89; $274.89 taken as a net single premium for temporary insurance for $5,000.00, at age forty-three, will continue such insurance in force for five years, fifty-seven and nine tenth days. Deducting $667.15 from $942.94 leaves $275.79, and this sum taken as a net single premium for temporary insurance on a policy for $5,000.00, computed at age forty-three, on the actuaries' or combined experience table of mortality, with four per cent interest per annum, would carry such a policy five years and sixty-four days. The
31 Principles and Practice of Life Insurance, to which you refer, is a standard actuarial work; it is used by practically every life insurance company in the United States. The net value of the policy is the amount which, together with future premium payments agreed to by the insured, will provide the benefit guaranteed under the policy. The gross premium is made up in three parts: First, contribution to current mortality; second, contribution to reserve for future mortality; third, loading for expenses. The mortality table is a table showing the progress of a group of lives as the group advances from year to year, and the table shows the number dying each year and the number surviving to the next year. The net single premium for temporary insurance is the premium which will provide for the payment of the face amount of insurance in the event of the death of the insured within the period of years to be covered.

Cross-examination:

Assuming that there is an indebtedness outstanding on a policy at the time of lapse, amounting to $1,350.00, which would be deductible from three-fourths of the reserve, in arriving at the balance to be applied as a net single premium to the purchase of extended insurance, there would be no balance on this policy available for extended insurance.

L. H. BREUER, being duly sworn, testified on behalf of the plaintiff as follows:

Direct examination.

By Mr. O'Donohoe:

My name is L. H. Breuer; I reside in Rolla; I am en-
32 gaged in the practice of law; have been practicing law for

twelve or thirteen years. I am familiar with insurance cases; and am familiar with the facts in this case, depositions, pleadings and everything.

Q. I will ask you to state what, in your opinion would be a reasonable attorney's fee for trying this case in the Circuit Court.

The defendant objects to the introduction of any evidence on the part of plaintiff for the recovery of damages and attorney's fees, are unconstitutional and void, and in violation of Section 4 of Article II of the Constitution of the State of Missouri, and Section 10 of Article II of the Constitution of Missouri, and Section 3 of Article II of the Constitution of Missouri, and Section 10 of Article I of the Constitution of the United States, and Section 1 of the Fourteenth Amendment to the Constitution of the United States, and because said statute and the Act of March 30, 1911, as aforesaid, if applied to the facts in this case, deny to the defendant due process of law as guaranteed to it by said Federal and State Constitutions; which objection was by the Court overruled; to which action of the Court in overruling said objection offered by the defendant, the defendant, in open court, by counsel, objected and excepted at the time.

A. Five hundred dollars.

Cross-examination:

I did not say that I was familiar with what had been done in the case; I said I was familiar with all of the pleadings; I based
33 my assumption of five hundred dollars as a reasonable attorney's fee upon the amount of the policy involved and the matter of taking the testimony and the matter of looking up the law in the case and briefing it and preparing it for trial; I did not look up any law in this case; I assume that I know what it would be reasonably worth to prepare a case of this character for trial. I assume that there was some law looked up in the case, and my conclusion of the reasonable value of an attorney's fee is based on the assumption that there was some law looked up.

The plaintiff here rested her case.

At the close of the plaintiff's testimony the defendant asked the Court for the following declaration of law:

The Court declares the law to be that under the pleadings and the evidence at the close of the whole case, its findings must be for the defendant.

Which said declaration of law was by the Court refused; to which action of the Court in refusing said declaration of law defendant, in open court, by counsel, objected and excepted at the time.

Defendant's Evidence.

SEYMOUR M. BALLARD, being produced, sworn and examined on part of the defendant, by deposition testified as follows:

My name is Seymour M. Ballard; I am sixty-four years of age; I reside in the City of New York and I am secretary of the defendant, New York Life Insurance Company; I have been secretary of the defendant for more than twelve years. My duties as
34 secretary are such that customarily devolve upon an executive officer of a corporation. It is my duty to receive all communications addressed to the defendant, conduct its general correspondence, attend various committees in connection with the company's work, supervise the work of sundry divisions of the defendant, and I have official custody of the defendant's files and records. I herewith produce and attach as a part of my deposition original application of the insured for the policy in suit, which I have identified as Ballard's Exhibit "A."

Defendant offered in evidence Ballard's Exhibit "A", which is as follows:

BALLARD'S EXHIBIT "A."

Application to the New York Life Insurance Company.

2,054,961. Declined. 158,164.

1. A Name of the person applying for insurance on his (or her) life. Josiah Boon Dodge.

Note.—Write the name in full.

B Residence: St. Louis, 952 Maryville ave.
D To what address shall notices of premium be sent? St. Louis, 952 Maryville ave.
2. A Present occupation or employment; if more than one, state all. Manufacturers' agent, local manager Whitehead & Hoag Co.

Note.—It is not sufficient to answer "Merchant," "Mechanic," "Salesman," or "Clerk"; the particular branch of business or trade must be specified, and full particulars given, especially when the occupation is in any way hazardous. If member of a firm, give name of firm in full.

B Are you married? Yes.

3. A Place of birth. Grass Valley, Calif.
35 B Race or nationality. American.
C Born on 27th day of September, 1864.
D Age nearest birthday. 36.
4. A Are you now insured in any company or society? (Answer "Yes," or "No.") Yes.

B If so, state in what companies or societies, and the amount insured in each. American Union Life Ins. Co. of New York; $3,000.

C Have you an application now pending in any company or society? No.

D If so, give name of company or society.

5. A Has any company or society ever declined to issue a policy on your life? Yes.

B If so, state name of company or society. Mutual Life Ins. Co., N. Y.; Penn Mutual, Phila.

6. A Has any company or society ever issued, or offered to issue, a policy on your life differing from the one then applied for? No.

B If so, state name of company or society, and give particulars.

7. A To whom is the insurance applied for to be payable in event of death? Leo F. Dodge.

Note.—Write the name in full.

B Present residence. St. Louis, Mo.

C Relationship to you. Wife.

8. Do you wish to reserve the right to change the beneficiary at any time, if not then assigned? Yes.

9. A Do you desire an accumulation policy as set forth in that policy-form of the company? Yes.

B If so, which accumulation period do you select? I select the 20-year accumulation period.

10. A Do you desire a policy with "Premium-Return" in case of death within the accumulation period? No.

36 B If so, is such return to be equal to one-half, or all, the premiums paid. Premium return to be equal to — the premiums paid.

11. Sum to be insured, $5,000.00.

Premiums payable quarterly.

On what table? Endowment payable in 20 years.

Note.—Strike out the rates and plans not desired.

I agree, on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, as follows: 1. That inasmuch as only the officers at the home office of the company in the City of New York have authority to determine whether or not a policy shall issue on any application, no statements, promises or information made or given by, or to, the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the company or in any manner affect its rights, unless such statements, promises or information be reduced to writing, and presented to the officers of the company at the home office, in this application. 2. That in any distribution of surplus or apportionment of profits, the principles and methods which may be adopted by the company for such distribution or apportionment, and its determination of the amount equitably belonging to any policy which may be issued under this application, shall be conclusive upon the insured under said policy and upon all parties having or claiming any interest thereunder. 3. That the issue of

a policy and the payment of the first premium thereof in full during my lifetime and good health shall be a condition precedent to any liability of the company under this application, and that such payment shall relate back to the date on which the insurance
37 under said policy takes effect. 4. That any insurance under this application shall take effect as of the date of this application, unless otherwise agreed in writing. 5. That any payment in advance on account of premium shall be binding on the company only in accordance with the agent's or cashier's receipt therefor on the company's authorized form. 6. That the policy applied for shall be in the form now in use by the company, and that the contract contained in such policy and in this application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of the company. 7. That any policy that may be issued in pursuance of this application shall be in consideration of my promises made in this application.

Dated at St. Louis this 23rd day of August, 1900.

Witnessed by Wm. Randolph, agent.

Other agents:

Signature of the person applying for insurance. (Write the name in full.) Josiah B. Dodge.

Names and residences of three intimate friends:

Accumulation. 900-378.

Statement to be Signed by Applicant Upon Payment of the Premium of Any Part Thereof.

(O. C. 2495.)

Dated at ——, —— —, 1900.

I hereby declare that I have paid to —— —— — dollars in cash, and that I hold his receipt for same.

(Signature of applicant.) I. S.

(Seal) Missouri Clearing House.

No. 64 Kings County, Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

(O. C. 2495.)

Received from —— ——, at ——, State of ——, this
38 — day of ——, 1900, the sum of — dollars, the sum declared by applicant in his application to have been paid in cash, on the following conditions and agreements:

First. That if a policy be issued on the application for insurance made by the above this day to the New York Life Insurance Company, corresponding in date and number with this receipt, said company shall accept this receipt as cash towards payment of the first premium on the said policy.

Second. That the company shall incur no liability under such application until it has been received, approved, policy issued thereon by the company at the home office, and the full premium and U. S. internal revenue tax have actually been paid to and accepted by the

company or its authorized agent during the lifetime and good health of the person upon whose life the insurance is applied for. The company reserves the absolute right of disapproval of such application.

Third. That this receipt will not be valid if issued for any sum in excess of the sum declared by applicant in such application to have been paid; it will not be valid if issued after Sept. 30, 1900; it will not be valid if erasures or additions have been made in the printed form; and it will not be valid unless the person to whom it is issued is promptly examined by a regularly appointed examiner of the New York Life Insurance Company.

Fourth. That if a policy be not issued on said application and examination within sixty days from this date (and only in that event), said sum will be returned on surrender of this receipt to the company.

Fifth. It is expressly agreed that the liability of the com-
39 pany upon this receipt, in any event, shall not exceed the sum declared by the applicant in his application to have been paid, and that this receipt is non-negotiable, and cannot be assigned or transferred.

(Agent must sign here) —— ——, *Agent*.

Missouri Clearing House. 21390.

Cashiers will fill out this blank correctly and distinctly.

Names and addresses of every agent to whom this business belongs and his share in the amount of the policy:

Name, Wm. Randolph; address, St. Louis; share, all.

Agent to whom the business belongs by assignment of his contract: G. W. Hall, Gags.

Endorsement on back: In respect only to profits this policy is placed in the adjustable accumulation class, and in determining the profits to be apportioned to this policy, the mortality experience of the company among persons insured in that class shall be used.

The applicant amended his application by a writing, which I herewith produce and which is identified as Ballard's Exhibit "B."

Defendant thereupon offered in evidence Ballard's Exhibit "B," which is as follows:

BALLARD'S EXHIBIT "B."

Dodge. 2,054,961.

Division of Policy Issues.

To the New York Life Insurance Company, 346 & 348 Broadway, New York:

I hereby accept policy No. 2,054,961, which contains the following clause:

40 "In respect only to profits, this policy is placed in the Adjustable Accumulation Class, and in determining the profits to be apportioned to this policy, the mortality experience of the company among persons insured in that class shall be used."

The answer to Question No. 11 in my application should be as follows: Endownment payable in twenty years with proportionate paid up.

The answer to Question No. — in my application should be as follows: Date policy October 20th.

I hereby present this acceptance as an amendment to my application dated the 23rd day of August, 1900, and agree that it shall form a part of said application, the agreements in which I hereby renew and confirm.

J. B. DODGE.

Dated at St. Louis Oct. 20th, 1900.

Witness:
G. W. HALL.

Stamped on face: Received Oct. 29, 1900. Home Office.
Stamped on back: Received Nov. 1, 1900. File Clerk.

I herewith produce the original policy marked "Ballard's Exhibit C."

Defendant thereupon offered in evidence Ballard's Exhibit "C," which is as follows:

BALLARD'S EXHIBIT "C."

This policy requires revenue stamps to the amount of $4.00, which must be affixed and canceled on delivery, and must be paid for by the insured.

[$4.00 Revenue Stamps—Canceled.]

New York Life Insurance Company

agrees to pay Five Thousand Dollars to Leo F., wife of the
41 insured; or in the event of her prior death, to the insured's executors, administrators or assigns, or to such other beneficiary as may be designated by the insured as herein provided, at the Home Office of the Company, in the City of New York, immediately upon receipt and approval of proofs of the death of Josiah B. Dodge, the insured, of St. Louis, in the State of Missouri, if such death shall occur before the twentieth day of October in the year nineteen hundred and twenty.

Change of Beneficiary.—The insured may at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries by written notice to the Company, at its Home Office, accompanied by this policy; such change to take effect on the endorsement of the same on the policy by the Company. After endorsement the policy will be returned.

This policy participates in the profits of the Company as herein provided.

If the insured is living on the twentieth day of October, nineteen hundred and twenty, which is the end of the twenty-year accumulation period of this policy, and if the premiums have been duly paid to that date and not otherwise, the Company will then apportion to this policy its share of the accumulated profits and the insured shall then have the option of one of the following three accumulation benefits:

(1) Receive the entire cash value, as stated below, converted into an annual income for life, and discontinue this policy; or,

(2) Receive the entire cash value, as stated below, in cash, and discontinue this policy; or,

(3) Receive the entire cash value, as stated below, con-
42 verted into paid-up insurance payable at death only, subject to evidence of insurability satisfactory to the Company, and discontinue this policy.

At the end of the accumulation period the Company will send to the insured a written statement of the results under the three accumulation benefits. If a selection by the insured of one of these benefits is not received by the Company within three months thereafter, it will be assumed that the insured desires to discontinue this policy under the second benefit, and the entire cash value will be held as a credit with interest at such rate per annum as the Company may declare on such funds, and shall be payable, as the insured may direct, in one sum or in not more than ten installments.

The Company guarantees that the entire cash value of this policy at the end of the accumulation period shall be Five Thousand Dollars, and in addition thereto the cash profits then apportioned by the Company.

Cash Loans Available on Demand.

Cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years, if premiums have been duly paid to the anniversary of the insurance next succeeding the date when the loan is made. Application for any loan must be made in writing to the Home Office of the Company, and the loan will be subject to the terms of the Company's loan agreement. The amount of loan available at any time is stated below, and includes any previous loan then unpaid. Interest will be at the rate of five per cent per annum in advance.

43 *Table of Cash Loans and of Paid-up Insurance.*

The Cash Loans and the Paid-up Insurance stated below apply to a Policy of $1,000; but this Policy is for $5000, and the Cash Loan and the Paid-up Insurance will be five times the amount stated in the table below.

After expiration of—	Cash loans.*	Paid-up insurance, payable at end of endowment period or at prior death.†
2 Years	$ 98.00	$ 75.00
3 Years	$ 134.00	$150.00
4 Years	$ 178.00	$200.00
5 Years	$ 227.00	$250.00
6 Years	$ 270.00	$300.00
7 Years	$ 314.00	$350.00
8 Years	$ 360.00	$400.00
9 Years	$ 408.00	$450.00
10 Years	$ 457.00	$500.00
11 Years	$ 508.00	$550.00
12 Years	$ 561.00	$600.00
13 Years	$ 616.00	$650.00
14 Years	$ 674.00	$700.00
15 Years	$ 734.00	$750.00
16 Years	$ 796.00	$800.00
17 Years	$ 861.00	$850.00
18 Years	$ 929.00	$900.00
19 Years	$1,000.00	$950.00
20 Years	For Special Advantages at end of Accumulation Period, see Three Accumulation Benefits on first page.	

*To arrive at the amount of Cash Loan available in any year, multiply the amount stated opposite that year, as directed above.

†To arrive at the amount of Paid-up Insurance available in any year, multiply the amount stated opposite that year, as directed above.

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Pr-Pd-up-End-20-C-36-1000-A.

Installment Benefits.—The insured may change the payment of the proceeds of this policy, when it becomes a claim by death, from payment in one sum, as provided on the first page hereof, to payment by annual installments, as provided on the fourth page hereof.

2d page.
9357-20.

This policy is automatically non-forfeitable from date of issue, as follows:

First. If any premium due within the first two insurance years is not duly paid, this policy will automatically continue for $5000 for

the number of days hereinafter specified, counting from the date t
which premiums were duly paid; if premiums are paid for thre
months, the policy will be continued for 37 days; if for six months
45 days; if for nine months, 53 days; if for one year, 2 months; i
for one year and three months, 75 days; if for one year and si
months, 3 months; if for one year and nine months, 105 days.

Second. If any premium due after the first two insurance years i
not duly paid, and if there is no indebtedness to the Company, thi
policy will automatically continue for the amount of paid-up in
surance specified in the table on the second page hereof. Such paid-u
insurance shall be payable at the death of the insured, i
45 death occurs within the endowment period, or, at the end
such period, if the insured is then living.

Third. If any premium or interest due after the first two insu
ance years is not duly paid, and if there is an indebtedness to th
Company, this policy will automatically continue for such amoun
of paid-up insurance as any excess of the reserve held by the Com
pany over such indebtedness will purchase according to the Com
pany's present published table of single premiums. Such paid-u
insurance shall be payable at the death of the insured, if death o
curs within the endowment period, or, at the end of such period,
the insured is then living.

The paid-up or continued insurance specified above shall be sub
ject to the provisions of this policy, but without participation i
profits, cash loans, or further payment of premiums.

Grace in Payment of Premiums.—A grace of one month, durin
which the policy remains in full force, will be allowed in payme
of all premiums except the first, subject to an interest charge at th
rate of five per cent per annum.

Reinstatement.—The insured may secure reinstatement of th
policy during the accumulation period at any time within five yea
after the non-payment of any premium, under the following cond
tions: written application to the Home Office with evidence of i
surability satisfactory to the Company; payment of premiums fro
the date to which premiums were duly paid to the date of reinstat
ment, with interest at the rate of five per cent per annum, and pa
ment or reinstatement of any loans, including payment of any i
terest due and unpaid.

General Provisions.—(1) Only the president, a vice-pres
46 dent, the actuary or the secretary has power in behalf of th
Company to make or modify this or any contract of insu
ance or to extend the time for paying any premium, and the Com
pany shall not be bound by any promise or representation heret
fore or hereafter given by any person other than the above. (2
Premiums are due and payable at the Home Office, unless otherwi
agreed in writing, but may be paid to an agent producing receip
signed by one of the above-named officers and countersigned by th
agent. If any premium is not paid on or before the day when du
or within the month of grace, the liability of the Company shall
only as hereinbefore provided for such case. (3) If the age of th
insured is incorrectly stated, the amount payable under this polic

shall be the insurance which the actual premium paid would have purchased at the true age of the insured. Age will be admitted on satisfactory proof. (4) In any distribution of surplus or apportionment of profits, the principles and methods which may be adopted by the Company for such apportionment and its determination of the amount equitably belonging to this policy shall be conclusive upon the insured and upon all parties having or claiming any interest under this policy. (5) Any indebtedness to the Company, including any balance of the premium for the insurance year remaining unpaid will be deducted in any settlement of this policy or of any benefit thereunder. (6) Any assignment of this policy must be made in duplicate and both sent to the Home Office, one to be retained by the Company and the other to be returned. The Company has no responsibility for the validity of any assignment.

47 This policy is absolutely free of conditions as to residence, occupation, travel, habits of life, and manner, time or place of death. No permit or extra premium will be required for military or naval service in time of war or in time of peace.

This policy is incontestable from date of issue.

This Agreement is made in consideration of the sum of sixty-nine dollars and ninety-five cents, the receipt of which is hereby acknowledged, and of the payment of a like sum on the twentieth day of January, April, July and October thereafter, in every year during the continuance of this policy until twenty full years' premiums shall have been paid.

In witness whereof, the New York Life Insurance Company has caused this agreement to be signed by its president and secretary, countersigned by its registrar or assistant registrar, and delivered this twentieth day of October, one thousand nine hundred.

Clause relating to adjustable accumulation class inserted before signing.

In respect only to profits this policy is placed in the adjustable accumulation class, and in determining the profits to be apportioned to this policy, the mortality experience of the Company among persons insured in that class shall be used.

JOHN A. McCALL, *President.*

CHAS. C. WHITNEY, *Secretary.*
SAM W. FERRIER, *Registrar.*

3d page.
E. C. 99-357. Pr. Pd.-up.

Examined,
E. M. L.

Installment Benefits.

48 The insured may change the mode of payment of the proceeds of this policy as a death claim, at any time within five years from date of issue, if not then assigned, from payment

in one sum, as provided on the first page, to payment by annual installments, as stated below.

The following tables are based upon a policy of $1,000, and will apply pro rata to the amount payable under this policy, provided the amount is not less than $1,000; if the amount is less than $1,000, these installment benefits shall not apply, but the proceeds of this policy will be payable in one sum only:

Limited Installments.

Annual installments limited to the number stated below; any number from two to twenty-five may be selected by the insured.

Number of Installments	25	20	19	18	17
Amount of each Installment	$56	*$65	$67	$70	$73
Number of Installments	16	15	14	13	12
Amount of each Installment	$77	$81	$85	$91	$97
Number of Installments	11	10	9	8	7
Amount of each Installment	$104	$113	$124	$138	$155
Number of Installments	6	5	4	3	2
Amount of each Installment	$179	$211	$261	$343	$507

*Illustration.—If payment is to be made by 20 installments, the amount of each installment will be $65 for each $1,000 of insurance.

Continuous Installments.

Twenty-five annual installments at least to be paid, but installments to continue during entire lifetime of beneficiary.

49 (Payment by continuous installments cannot be selected if there is more than one beneficiary under this policy.)

	Under						
Age of Beneficiary at Death of Insured	15	16	17	18	19	20	21
Am't of each Installm't	$40	$40	$40	$40	$40	$41	$41
Age of Beneficiary at Death of Insured	22	23	24	25	26	27	28
Am't of each Installm't	$41	$41	$41	$42	$42	$42	$43
Age of Beneficiary at Death of Insured	29	30	31	32	33	34	35
Am't of each Installm't	$43	*$43	$44	$44	$44	$45	$45
Age of Beneficiary at Death of Insured	36	37	38	39	40	41	42
Am't of each Installm't	$46	$46	$47	$47	$48	$48	$48
Age of Beneficiary at Death of Insured	43	44	45	46	47	48	49
Am't of each Installm't	$49	$49	$50	$50	$51	$51	$52
Age of Beneficiary at Death of Insured	50	51	52	53	54	55	56
Am't of each Installm't	$52	$52	$53	$53	$53	$54	$54

Over

Age of Beneficiary at Death of Insured	57	58	59	60	61	62	63	64
Amount of each Installment	$54	$54	$55	$55	$55	$55	$55	$55

*Illustration.—If at the death of the insured the beneficiary should be 30 years of age last birthday, the amount of each annual installment will be $43 for each $1,000 of insurance, payable during the entire lifetime of the beneficiary, but if the beneficiary should die before the 25 installments shall have been paid, the remainder of the 25 installments will continue to be paid annually to the executors, administrators or assigns of the beneficiary.

50 The insured may subsequently change his selection under these installment benefits; he may also revoke all selections, thereby making this policy again payable in one sum.

No selection, change or revocation shall take effect until endorsed on this policy by the Company. After endorsement this policy will be returned to the insured.

The payment of the first installment shall be made immediately upon receipt and approval of proofs of the death of the insured, and subsequent installments shall be paid annually thereafter.

The beneficiary can neither assign nor commute unpaid installments unless such right is given by the insured to the beneficiary when payment in installments is directed.

4th page.
9342.

Filing:

New York Life Insurance Company.

Josiah B. Dodge.

Insurance and Investment Policy No. 2054961.

Age 36. Amount $5,000.

Quarter Annual Premium $69.95.

Insurance Year begins on October 20th.

Endowment Period ends on October 20th, 1920.

Notice: It is not necessary for the insured or the beneficiary to employ the agency of any person, firm or corporation, in collecting the insurance under this policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Home Office, 346 and 348 Broadway, New York City.

99-357.

A. A. 2.

C. Endowment. Pr. Pd.-up.

20 Yr. Accumulation.

Installment Option.

51 Stamped on back: Surrendered under terms of policy loan agreement, Dec. 17, 1907. Auditor's Dept.—Paid up and cancel loan. Dec. 23, 1907—Filed by No. 14.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

On August 31, 1903, the defendant received at its home office the written application of the insured for a loan of $490.00, upon the pledge of said policy as collateral security therefor, and I herewith produce this application, which is marked "Ballard's Exhibit D."

Thereupon defendant offered in evidence Ballard's Exhibit "D," which is as follows:

BALLARD'S EXHIBIT "D."

—— —, 190—

New York Life Insurance Company, 346 and 348 Broadway, New York:

Re Policy No. 2,054,961.

Application is hereby made for a cash loan of $490.00 on the security of the above policy, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, subject to the terms of said company's loan agreement.

Said policy is forwarded herewith for deposit with said company as collateral security, together with said company's loan agreement duly signed in duplicate.

JOSIAH B. DODGE.

Forwarded from Missouri Clearing House branch office, Aug. 29, 1903.

HARRY L. OREAR, *Cashier.*

52 (Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

Stamped on face: Received Aug. 31, 1903, Policy Loan Division. Received Aug. 31, 1903, Home Office.
Stamped on back: Received, Sep. 17, 1903, File Department.

Defendant accepted the insured's application for a loan of $490.00, which is marked "Ballard's Exhibit D," at its home office in the City of New York, and also received from the insured his policy loan agreement, which I herewith produce and which is marked "Ballard's Exhibit E."

Defendant thereupon offered in evidence Ballard's Exhibit "E," which is as follows:

BALLARD'S EXHIBIT "E."

Special Notice.—The policy loan made under this agreement is not conditioned upon any obligation or requirement to make application for additional insurance, and no person is authorized to make any charge for obtaining it.

Policy Loan Agreement.

The undersigned Josiah B. Dodge, hereby acknowledges the receipt this 31st day of August, 1903, of the sum of four hundred ninety dollars ($490.00), from the New York Life Insurance Company, at the City of New York, as a loan under Policy No. 2,054,961, issued by said company on the life of Josiah B. Dodge, in accordance with, and subject to, the terms of said policy; and as collateral security for the repayment of said loan, with interest, hereby
53 pledges and deposits said policy and its accumulations with said company, subject to the following conditions:

1. Interest on said loan shall be paid in advance from this date to the 20th of October, 1903, the date of the next anniversary of said policy, and annually in advance on and after said date, at the rate of five (5) per cent per annum, at the home office of said company in the City of New York.

2. In the settlement of any claim or of any benefit under said policy, before said loan shall have been fully repaid, and while said policy is in full force by the due payment of premiums and interest, said company shall be liable only for the return of the net proceeds of said policy after deducting said loan and accrued interest, if any, and any other indebtedness on said policy.

3. In the event of default in the payment of any premiums on said policy or of any interest on said loan, settlement of said loan and of any other indebtedness on said policy shall be made, without further notice, in accordance with the provisions of said policy.

4. The right to repay said loan at any time to said company, while said policy is in full force by the payment of premiums and interest, and to reclaim possession of said policy, is hereby reserved. The repayment of said loan and accrued interest, if any, shall, without further action, cancel and annul this agreement.

5. If said loan is repaid in cash, or if settlement is made in accordance with paragraphs 2 or 3 of this agreement, any interest paid beyond the date of said repayment, or beyond the date of said settlement, shall be refunded.

6. As the amount of loan available at any time includes any previous loan then unpaid, the execution of a subsequent loan agreement, without further action, cancels and annuls any previous agreement.

54

7. Any notice under this agreement duly addressed and mailed to the last known postoffice address of the undersigned shall be deemed to have been served on the day following the date of said mailing.

JOSIAH B. DODGE. [L. S.]

Signed and sealed in presence of

H. L. OREAR, *J. R. P.*

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

Forwarded from Missouri Clearing House branch office, Aug. 29, 1903.

HARRY L. OREAR, *Cashier.*

Stamped on face: J. C. Whitney, Auditor. Sep. 4, 1903. $490. Filed: H. W. R.

Stamped on back: Dec. 23, 1907. Filed by No. 34.

The original policy, Ballard's Exhibit "C," accompanied said policy loan agreement, Ballard's Exhibit "E," and was deposited as a pledge with the defendant, pursuant to the terms of the loan agreement. The proceeds of said loan were $490.00, which the defendant paid to the insured by deducting from the face amount thereof interest at five per cent per annum from the date of the loan to the next anniversary of the policy, October 20, 1903, amounting to $3.09, and it paid to the insured the balance of said loan, amounting to $486.91, by a check duly mailed to the insured from its home office in New York. I herewith produce this check, which is marked "Ballard's Exhibit F."

Defendant thereupon offered in evidence Ballard's Exhibit "F," which is as follows:

55 BALLARD'S EXHIBIT "F."

No. 2869.

New York Life Insurance Company.

New York, Sep. 4, 1903.

The National City Bank of New York

Pay to the order of Josiah B. Dodge, four hundred and eighty-six and 91/100 dollars ($486.91).

H. H. SILVERMAN,
Asst. Treasurer.
THEO. M. BANTA,
Cashier.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

Stamped on face: Received payment through New York Clearing House, Sep. 10, 1903. Bank of New York, N. B. A.
Endorsed on back: Josiah B. Dodge, J. B. Dodge.
Stamped on back: Pay any bank, banker or trust company, or order, previous endorsements guaranteed, Sep. 8, 1903. Missouri Trust Co. of St. Louis. Jos. L. Hanley, Treas.
Pay the Bank of New York, N. B. A. or order. Brown Brothers & Co.

Thereafter, on the 4th day of November, 1904, defendant at its home office in New York City received another application for a loan on said policy, which I herewith produce and which is marked as "Ballard's Exhibit G."

Defendant thereupon offered in evidence Ballard's Exhibit "G," which is as follows:

56 BALLARD'S EXHIBIT "G."

St. Louis, Oct. 31, 1904.

New York Life Insurance Company, 346 and 348 Broadway, New York:

Re Policy No. 2,054,961.

Application is hereby made for a cash loan of $890.00 on the security of the above policy, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, subject to the terms of said company's loan agreement.

Said policy is forwarded herewith for deposit with said company as collateral security, together with said company's loan agreement duly signed in duplicate.

JOSIAH B. DODGE.
LEO F. DODGE.

Forwarded from Missouri Clearing House branch office 11/2, 1904.

EDWARD F. SUHRE, *Cashier.*

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

Stamped on face: Received Nov. 4, 1904, Policy Loan Division.

Defendant accepted the insured's application for the second loan, which is marked "Ballard's Exhibit G," at its home office in the City of New York, and as evidence of the second loan the insured and the beneficiary made and filed a policy loan agreement, which I herewith produce and which is marked as "Ballard's Exhibit H."

Defendant thereupon offered in evidence Ballard's Exhibit "H," which is as follows:

57 BALLARD'S EXHIBIT "H."

Policy Loan Agreement.

Pursuant to the provisions of Policy No. 2,054,961, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, the undersigned have this day obtained a cash loan from said company of the sum of eight hundred ninety dollars ($890.00), the receipt of which is hereby acknowledged, conditioned upon pledging said policy with said company as collateral security for said loan and giving assent to the terms of this policy loan agreement; therefore,

In consideration of the premises, the undersigned hereby agree as follows:

1. To pay said company interest on said loan at the rate of five per cent per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter.

2. To pledge, and do hereby pledge, said policy as collateral security for the payment of said loan and interest, and herewith deposit said policy with said company at its home office.

3. To pay said company said sum when due with interest, reserving, however, the right to reclaim said policy by repayment of said loan with interest at any time before due, said repayment to cancel this agreement without further action.

4. That said loan shall become due and payable—

(*a*) Either if any premium on said policy or any interest on said loan is not paid on the date when due, in which event said pledge

shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by satisfying said loan in the manner provided in said policy;

58 (*b*) Or, (1) on the maturity of the policy as a death-claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the selection of a discontinuing option at the end of any dividend period. In any such event the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy.

5. That the application for said loan was made to said company at its home office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said home office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said home office of said company.

In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals this 2nd day of November, 1904.

JOSIAH B. DODGE. [L. S.]
LEO F. DODGE. [L. S.]

Signed and sealed in presence of
O. A. SLAVENS.

Forwarded from Missouri Clearing House branch office. Prem. paid in full to 10/20/04.
11/2, 1904.

EDWARD F. SUHRE, *Cashier.*

Stamped on face: J. C. Whitney, Auditor. $890. Nov. 14, 1904. Per W. H. C.
Stamped on back: Dec. 28, 1907. Filed by No. 24.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

In connection with the second loan on this policy, the insured and the beneficiary made and delivered to the defendant at
59 its home office their written direction for the application of the proceeds of said loan, which I herewith produce and which is marked "Ballard's Exhibit I."

Defendant thereupon offered in evidence Ballard's Exhibit "I," which is as follows:

BALLARD'S EXHIBIT "I."

St. Louis, Oct. 31, 1904.

New York Life Insurance Company, 346 and 348 Broadway, New York.

Re Policy No. 2,054,961.

Please deduct from the cash loan of $890.00 applied for on October, 1904, on the security of the above policy, an amount sufficient to pay first loan of $490.00 and premiums in advance to Oct., 1905.

JOSIAH B. DODGE.
LEO F. DODGE.

Witness:
O. F. SLAVENS.

Forwarded from Missouri Clearing House branch office, 11/2, 1904.

EDWARD F. SUHRE, *Cashier.*

Stamped on face: Received Nov. 4, 1904. Policy Loan Division.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

Pursuant to the terms of Ballard's Exhibit "I," the defendant paid the insured and the beneficiary the amount of the second loan, by applying the proceeds thereof as follows: $236.90 was applied to satisfy one year's premium on said policy, which was due and payable October 20, 1904, and as this payment was made November
60 14, 1904, there was a grace interest on said premium of 90 cents, so that the total amount paid out on said loan on account of the premium due October 20, 1904, and the interest, was $264.80. The company also deducted therefrom the interest on the policy loan in advance to October 20, 1905 at the rate of 5 per cent per annum, amounting to $43.20, and also paid and satisfied out of the proceeds of said loan the former loan of $490.00, which left a balance due to the borrowers of $92.10, which was paid by defendant's check dated November 14, 1904, which I herewith produce and which is marked as "Ballard's Exhibit J."

Defendant thereupon offered in evidence Ballard's Exhibit "J," which is as follows:

BALLARD'S EXHIBIT "J."

No. 73825.

New York Life Insurance Company:

New York, Nov. 14, 1904.

Hanover National Bank,

Pay to the order of Josiah B. Dodge and Leo F. Dodge ninety-two 10/100 dollars ($92.10).

F. H. SIMMONS, *Treasurer.*
THEO. M. BARTON, *Cashier.*

Endorsed on back: Josiah B. Dodge, Leo F. Dodge, J. B. Dodge.
Stamped on back: Received payment through New York Clearing House, Nov. 19, 1904, The Bank of America. Pay Brown Bros. & Co., or order, Missouri Trust Co. of St. Louis, Jos. L. Hanley, Treas. Pay the Bank of America, or order, Brown Brothers & Co.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

61 Afterwards, on the 16th day of October, 1905, defendant received at its home office in New York an application for an additional loan, on the pledge of said policy as security therefor for $1,135.00, which I have identified as Ballard's Exhibit "K."
Defendant thereupon offered in evidence Ballard's Exhibit "K," which is as follows:

BALLARD'S EXHIBIT "K."

Sept. 26, 1905.

New York Life Insurance Company, 346 and 348 Broadway, New York.

Re Policy No. 2,054,961.

Application is hereby made for a cash loan of $1,135 on the security of the above policy, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, subject to the terms of said company's loan agreement.
Said policy is forwarded herewith for deposit with said company as collateral security, together with said Company's loan agreement duly signed in duplicate.

JOSIAH B. DODGE.
LEO F. DODGE.

Forwarded from Missouri Clearing House branch office, Oct. 13, 1905.

HARRY L. OREAR, *Cashier.*

Stamped on face: Received Oct. 16, 1905. Policy Loan Division.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

With this application for an additional loan of $1,135.00 the insured and the beneficiary submitted to the defendant at its
62 home office their policy loan agreement marked "Ballard's Exhibit L," which I herewith produce.

Defendant thereupon offered in evidence Ballard's Exhibit "L," which is as follows:

BALLARD'S EXHIBIT "L."

Policy Loan Agreement.

Pursuant to the provisions of Policy No. 2,054,961, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, the undersigned have this day obtained a cash loan from said company of the sum of eleven hundred thirty-five dollars ($1135.00), the receipt of which is hereby acknowledged, conditioned upon pledging said policy with said company as collateral security for said loan and giving assent to the terms of this policy loan agreement; therefore,

In consideration of the premises, the undersigned hereby agree as follows:

1. To pay said company interest on said loan at the rate of five per cent per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter.

2. To pledge, and do hereby pledge, said policy as collateral security for the payment of said loan and interest, and herewith deposit said policy with said company at its home office.

3. To pay said company said sum when due with interest, reserving, however, the right to reclaim said policy by repayment of said loan with interest at any time before due, said repayment to cancel this agreement without further action.

63 4. That said loan shall become due and payable—

(*a*) Either if any premium on said policy or any interest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by satisfying said loan in the manner provided in said policy;

(*b*) Or, (1) on the maturity of the policy as a death-claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the selection of a discontinuing option at the end of any div-

idend period. In any such event the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy.

5. That the application for said loan was made to said company at its home office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said home office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said home office of said company.

In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals this 26th day of Sept., 1905.

JOSIAH B. DODGE. [L. S.]
LEO F. DODGE. [L. S.]

Signed and sealed in presence of
E. A. BLAKEMORE.

Forwarded from Missouri Clearing House branch office. Prem. paid in full to—no record—Oct. 13, 1905.

HARRY L. OREAR, *Cashier.*

Stamped on face: J. C. Whitney, Auditor. $1,135. Nov. 14, 1905. Filed, W. N. C.

64 Stamped on back: Dec. 28, 1907. Filed by No. 24.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

The insured and the beneficiary also sent with Ballard's Exhibit "K" and Ballard's Exhibit "L" their request for the application of the proceeds of this loan, which original request is marked as "Ballard's Exhibit M."

Thereupon defendant offered in evidence Ballard's Exhibit "M," which is as follows:

BALLARD'S EXHIBIT "M."

Sept. 26, 1905.

New York Life Insurance Company, 346 and 348 Broadway, New York:

Re Policy No. 2,054,961.

Please deduct from the cash loan of $1,135 applied for on 9/25/05, on the security of the above policy, an amount sufficient to pay premiums to Oct., 1906, and first loan of $890.

JOSIAH B. DODGE.
LEO F. DODGE.

Witness:
E. A. BLAKEMORE.

Forwarded from Missouri Clearing House branch office, Oct. 13, 1905.

HARRY L. OREAR, *Cashier.*

Stamped on face: Received Oct. 16, 1905. Policy Loan Division.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My Commission expires March 30, 1916.

65 Defendant at its home office accepted said application for said loan of $1,135.00 marked "Ballard's Exhibit K," and paid the amount thereof to the borrowers as follows: Out of the proceeds thereof it satisfied the previous loan of $890.00 and also paid the interest on said loan of $1,135.00 from the date of the loan to the next anniversary of the policy at 5 per cent per annum, which was $56.75. The balance of said loan, $188.25, defendant credited on the October 20, 1905, premium on said policy for one year, the insured paying the balance of said yearly premium, $75.65, in cash.

On November 12, 1906, defendant at its home office in New York received a written application of the insured and the beneficiary under said policy for a loan of $1,350.00 on the security of said policy, which application is marked "Ballard's Exhibit N."

Defendant thereupon offered in evidence Ballard's Exhibit "N," which is as follows:

BALLARD'S EXHIBIT "N."

Nov. 9, 1906.

New York Life Insurance Company, 346 & 348 Broadway, New York:

Re Policy No. 2,054,961.

Application is hereby made for a cash loan of $1,350.00 on the security of the above policy, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, subject to the terms of said Company's Loan Agreement.

Said policy is forwarded herewith for deposit with said Company as collateral security, together with said Company's Loan Agreement duly signed in duplicate.

JOSIAH B. DODGE.
LEO F. DODGE.

66 Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906.

M. F. BAYARD, *Cashier.*

Stamped on face: Received Nov. 12, 1906. Policy loans division.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

The application for this loan of $1,350.00 was accompanied by a loan agreement, marked Ballard's Exhibit "O."

Defendant thereupon offered in evidence Ballard's Exhibit "O," which is as follows:

BALLARD'S EXHIBIT "O."

Policy Loan Agreement.

Pursuant to the provisions of Policy No. 2054961 issued by the New York Life Insurance Company on the life of Josiah B. Dodge, the undersigned have this day obtained a cash loan from said Company of the sum of thirteen hundred fifty dollars ($1,350.00), the receipt of which is hereby acknowledged, conditioned upon pledging as collateral said policy with said Company as sole security for said loan and giving assent to the terms of this Policy Loan Agreement; therefore,

In consideration of the premises, the undersigned hereby agree as follows:

1. To pay said Company interest on said loan at the rate of five per cent per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter.

2. To pledge, and do hereby pledge, said policy as sole
67 security for the payment of said loan and interest and herewith deposit said policy with said Company at its Home Office.

3. To pay said Company said sum when due with interest, reserving, however, the right to reclaim said policy by repayment of said loan with interest at any time before due, said repayment to cancel this agreement without further action.

4. That said loan shall become due and payable—

(*a*) Either if any premium on said policy or any interest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by satisfying said loan in the manner provided in said policy;

(*b*) Or, (1) on the maturity of the policy as a death claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the selection of a discontinuing option at the end of any dividend period. In any such event the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy.

5. That the application for said loan was made to said Company at its Home Office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said Home Office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said Company.

In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals this eighth day of November, 1906.

JOSIAH B. DODGE. [L. S.]
LEO F. DODGE. [L. S.]

68 Signed and sealed in presence of
GEO. T. LEWIS.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906.

M. F. BAYARD, *Cashier.*

Prem. paid in full to Oct. 20, '06, $116.40; reptd. 11/9/06, as balance to complete loan.
Stamped on face: Auditor's Dept. Paid up and cancel loan.
On left margin: Foreclosed and paid by deducting the amount of the debt from the value of the policy. John C. McCall, Secretary.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

The words "foreclosed and paid by deducting the amount of the debt from the value of the policy—John C. McCall, Secretary," on the left margin of Ballard's Exhibit "O" was not on there at the time it was first received by the defendant at its home office, but was put on said exhibit on or about the 17th day of December, 1907, after default had been made in the payment of the October 20, 1907, premium on said policy and after the indebtedness evidenced by Ballard's Exhibit "O" had been satisfied by the defendant out of the reserve held by the company on the policy, as provided on the third page of the policy. Defendant at its home office duly accepted said application marked Ballard's Exhibit "N" and received and filed Ballard's Exhibit "O" and held said policy pursuant to the terms of the loan agreement. Defendant also received on November 12, 1906, at its home office the written request of the insured and the beneficiary for the deposition of the proceeds of said loan of $1,350.00, marked Ballard's Exhibit "P."

69 Defendant thereupon offered in evidence Ballard's Exhibit "P," which is as follows:

BALLARD'S EXHIBIT "P."

Nov. 9, 1906.

New York Life Insurance Company, 346 & 348 Broadway, New York:

Re Policy No. 2,054,961.

Please deduct from the cash loan of $1,350.00 applied for on Nov., 1906, on the security of the above policy, an amount sufficient to pay present loan and prem. and int. to Oct., '07.

JOSIAH B. DODGE.
LEO F. DODGE.

Witness:
GEO. T. LEWIS.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906.

M. F. BAYARD, *Cashier.*

Stamped on face: Received Nov. 12, 1906. Policy loans division.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

Pursuant to Ballard's Exhibit "P" the defendant out of the proceeds of the loan of $1,350.00 paid the existing loan on said policy of $1,135.00, and applied the balance on the premium that became due under said policy on the 20th of October, 1906, the insured paying the difference of said premium in cash. The policy lapsed for non-payment of the premium due October 20, 1907. The reserve held by the company on the policy at the time of its lapse was the reserve on the basis of the American Experience Table of Mortality and interest at 3 per cent per annum. The re-
70 serve held by the company on the policy at the time of lapse was less than the amount of indebtedness thereon, and therefore, after charging the indebtedness against the reserve there was nothing left with which to buy non-forfeiture insurance after the lapse of the policy for the non-payment of the premium due October 20, 1907. On or about the 17th day of December, the defendant mailed to the insured a letter, a copy of which is marked as Ballard's Exhibit "Q."

Defendant thereupon offered in evidence Ballard's Exhibit "Q", which is as follows:

BALLARD'S EXHIBIT "Q."

New York Life Insurance Company, 346 & 348 Broadway, New York.

Darwin P. Kingsley, President.

Secretaries' Department—Division of Policy Loan Securities.

F. M. H.

John C. McCall, Secretary.
Seymour M. Ballard, Secretary.

New York,

December 17th, 1907.

Mr. Josiah B. Dodge, 4952 Maryland Ave., St. Louis, Mo.

Re Policy No. 2054961.

DEAR SIR: By a loan agreement executed on the 8th day of November, 1906, the above policy on the life of Josiah B. Dodge was pledged to and deposited with the New York Life Insurance Company as collateral security for a cash loan of $1,350.00.

The premium and interest due on said policy on the 20th day of October, 1907, not having been paid, the principal of said
71 loan became due and has been settled according to the terms of the policy, and the policy has no further value.

Yours truly,

JOHN C. McCALL, *Secretary*,
By E. M. C.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

No proofs of death ever were received under the policy or anything else done in connection therewith after the mailing of the original of Ballard's Exhibit "Q" until the defendant on October 13, 1914, received a letter signed by one J. J. O'Donohoe, the original of which is marked Ballard's Exhibit "R."

Defendant thereupon offered in evidence Ballard's Exhibit "R", which is as follows:

BALLARD'S EXHIBIT "R."

James J. O'Donohoe, Attorney at Law,

Suite 701-702 Houser Building, 509 Chestnut Street.

St. Louis, Mo.,

Oct. 10, 1914.

New York Life Insurance Co., New York City.

GENTLEMEN: Mrs. Lea F. Dodge states that she was the wife and is now the widow of Josiah B. Dodge, who died on the 12th day of February, 1912; that her husband carried with you a policy for $10,000.00, and she has employed me to ascertain its condition.

Therefore, kindly give me the date of policy and the date to
72 which premiums were paid thereon, and also if there was a loan thereon, please give its amount.

Thanking you for the above information, I am,

Very truly yours,

J. J. O'DONOHOE.

Dict. J. J. O'D./F. L. D.

Stamped: Received Oct. 13, 1914. Policy Loan Division. Received Oct. 13, 1914. Home Office.

Index Division. Please give all policy numbers on this life. 85-214½, 2054961. 9/27/64. Dead.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

The defendant answered Ballard's Exhibit "R" under date of October 15, 1914, a copy of which letter is marked "Ballard's Exhibit S".

Defendant thereupon offered in evidence Ballard's Exhibit "S", which is as follows:

BALLARD'S EXHIBIT "S."

T. H. S.–M. McC.

New York,

October 15, 1914.

Mr. Joseph J. O'Donohoe, Suite 701-702 Houser Bldg., No. 509 Chestnut Street, St. Louis, Mo.

Re Josiah B. Dodge.

DEAR SIR: We are in receipt of your letter of October 10th, informing the company of the death of the above-mentioned person.

On October 20, 1900, this company did issue a policy of $5,000 on the life of Josiah B. Dodge. By a loan agreement executed
73 on the 8th day of November, 1906, the policy issued on the life of Josiah B. Dodge was pledged to and deposited with the New York Life Insurance Company as collateral security for a cash loan of $1,350. The premium and interest due on said policy on the 20th day of October, 1907, not having been paid, the principal of said loan became due and has been settled according to the terms of the policy. As the amount of the loan was the full reserve there was no further value to the policy, and a letter similar to the above was sent to Mr. Dodge and the policy canceled.

Yours very truly,

NORMAN R. HASKELL,
Asst. Sec'y. & Supt.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

The defendant received on October 19, 1914, a letter in answer to the letter marked "Ballard's Exhibit S", which is marked as "Ballard's Exhibit T."

Defendant then offered in evidence Ballard's Exhibit "T", which is as follows:

74 BALLARD'S EXHIBIT "T."

James J. O'Donohoe, Attorney at Law,

Suite 701-702 Houser Building, 509 Chestnut Street.

St. Louis, Mo.,

October 17, 1914.

Mr. Norman R. Haskell, Asst. Secy. & Supt. New York Life Ins. Co., 346-348 Broadway, New York City, N. Y.

DEAR SIR: Your favor of the 15th inst. in reference to policy on the life of Josiah B. Dodge, deceased, received, for which accept thanks.

Since I cannot properly advise Mrs. Dodge without more information, I beg to request a copy of the policy, copy of the loan agreement and copy of the letter to Mr. Dodge, all to be prepared and transmitted at my expense.

Thanking you in advance for the same, I am,

Very truly yours,

J. J. O'DONOHOE.

P. S.—Was any part of the loan applied to pay premiums?

Stamped on face: Superintendent of Claims, New York Life Ins. Co. Oct. 19, 1914.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

The defendant answered the letter marked "Ballard's Exhibit T" on October 24, 1913, a copy of which is marked as "Ballard's Exhibit U."

Defendant offered in evidence Ballard's Exhibit "U", which is as follows:

75 BALLARD'S EXHIBIT "U."

T. H. S.—F.

October 23rd, 1914.

Mr. James J. O'Donohoe, 509 Chestnut Street, St. Louis, Missouri.

Re Lapsed Pol. 2,054,961. Dodge—Dec.

DEAR SIR: As requested in your letter of October 17th, we are sending you photographs of the policy, loan agreement, and a copy of the letter to Mr. Dodge.

When the loan under this policy was increased from $490.00 to $890.00, the October, 1904, annual premium of $263.90 and grace interest of 90¢ were deducted. When the loan was increased from $890.00 to $1,135.00, an amount of $188.25 was deducted and applied in part payment of the October, 1905, premium. When the loan was increased to $1,350.00, an amount of $147.50 was deducted and applied in part payment of the October, 1906, premium.

Yours truly,

NORMAN R. HASKELL,
Asst. Secy. & Supt.

Enc.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

Defendant received an answer to the letter marked "Ballard's Exhibit U" from J. J. O'Donohoe, the original of which is marked as "Ballard's Exhibit V".

Defendant thereupon offered in evidence Ballard's Exhibit "V", which is as follows:

76 BALLARD'S EXHIBIT "V."

James J. O'Donohoe, Attorney at Law,

Suite 701-702 Houser Building, 509 Chestnut Street.

St. Louis, Mo.,

October 28th, 1914.

Mr. Norman R. Haskell, Assistant Secretary and Superintendent, New York Life Insurance Company, New York City, New York.

DEAR SIR: Your favor of the 23rd inst., in reference to policy number 2,054,691 on the life of Josiah B. Dodge, together with copy of policy and loan agreement of date the 8th day of November, 1906, duly received, for which accept thanks.

I would be unable to advise Mrs. Dodge without a copy of each loan agreement, and therefore I beg to ask you to send me the same at your earliest convenience.

Very truly yours,

J. J. *D'*DONOHOE.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

(Written in pencil, left margin) T. H. S. Send it.—N. R. H.

Defendant answered Ballard's Exhibit "V" on October 30, 1914, a copy of which letter is marked as "Ballard's Exhibit W."

Defendant thereupon offered in evidence Ballard's Exhibit "W," which is as follows:

77 BALLARD'S EXHIBIT "W."

T. H. S./B. C.

October 30th, 1914.

Mr. J. J. O'Donohoe, Suite 701 & 702 Houser Bldg., 509 Chestnut St., St. Louis, Mo.

Re Lapsed Pol. No. 2,045,691—Dodge—Dec'd.

DEAR SIR: As requested in your letter of October 28th, we are sending you with this letter photographs of all the loan agreements under the above numbered policy.

Yours very truly,

NORMAN R. HASKELL,
Asst. Secy. & Supt.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

On November 4, 1914, the defendant received an answer to the letter marked "Ballard's Exhibit W," the original of which is marked as "Ballard's Exhibit X."

Defendant thereupon offered in evidence Ballard's Exhibit "X," which is as follows:

78

BALLARD'S EXHIBIT "X."

In re Policy No. 2,045,691—Dodge.

James J. O'Donohoe, Attorney at Law,

Suite 701-702 Houser Building, 509 Chestnut Street.

St. Louis, Mo.,

November 2nd, 1914.

Mr. Norman R. Haskell, Assistant Secretary and Superintendent, New York Life Insurance Company, New York City, New York.

DEAR SIR: Your favor of the 30th ult., together with copy of loan agreements, received, for which accept thanks.

Very truly yours,

J. J. O'DONOHOE.

(Stamped under date line) Superintendent of Claims, New York Life Ins. Co. 5 o'clock, Nov. 4, 1914.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

On November 18, 1914, the defendant received another letter, the original of which is marked as "Ballard's Exhibit Y."

Defendant thereupon offered in evidence Ballard's Exhibit "Y," which is as follows:

79

BALLARD'S EXHIBIT "Y."

James J. O'Donohoe, Attorney at Law,

Suite 701-702 Houser Building, 509 Chestnut Street.

St. Louis, Mo.,

November 16, 1914.

Mr. Norman R. Haskell, Asst. Secy. & Supt., New York Life Ins. Co., New York City, N. Y.

DEAR SIR: Please let me know what loan of $490.00 was applied to made on Policy No. 2,054,961—Dodge. I regret to be obliged

to annoy you so much in this case, but I cannot advise Mrs. Dodge without the above information.

Thanking you for the same, I am,

Very truly yours,

J. J. O'DONOHOE.

Dict. J. J. O'D./F. L. D.

(Stamped in right-hand corner) Superintendent of Claims, New York Life Insurance Co., Nov. 18, 1914.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

Defendant answered Ballard's Exhibit "Y" on November 19, 1914, a copy of which is marked "Ballard's Exhibit Z."

Defendant thereupon offered in evidence Ballard's Exhibit "Z," which is as follows:

80 BALLARD'S EXHIBIT "Z."

T. H. S./B. C.

November 19th, 1914.

Mr. J. J. O'Donohoe, Suite 701-702 Houser Building, 509 Chestnut Street, St. Louis, Mo.

Re Policy No. 2,054,961—Dodge—Dec'd.

DEAR SIR: This letter is in reply to yours of November 16th. After deducting interest in advance, amounting to $3.09, the balance of the loan of $490.00, amounting to $486.81, was paid in cash.

The information asked for in your letter is not at all clear, but we presume that this is what you want.

Yours very truly,

NORMAN R. HASKELL,
Asst. Secy. & Supt.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

The defendant on November 23, 1914, received an answer to Ballard's Exhibit "Z," the original of which is marked Ballard's Exhibit "AA."

Defendant thereupon offered in evidence Ballard's Exhibit "AA," which is as follows:

81 BALLARD'S EXHIBIT "AA."

James J. O'Donohoe, Attorney at Law,

Suite 701-702 Houser Building, 509 Chestnut Street.

St. Louis, Mo.,

Nov. 21, 1914.

Mr. Norman R. Haskell, Asst. Secy. & Supt., New York Life Ins. Co., New York City, N. Y.

GENTLEMEN: Your favor of the 19th inst. with respect to loan on Policy No. 2,054,961—Dodge, received. The information therein contained is exactly what I want and I wish to thank you for the same.

Very truly yours,

J. J. O'DONOHOE.

(Margin, left-hand corner) T. H. S. File with papers in case.—N. R. H.

(Stamped on face:) Superintendent Claims. Nov. 23, 1914.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co. No. 79. My commission expires March 30, 1916.

This was all the correspondence and all that was done in or about the policy, so far as I know or so far as the defendant's records show. Defendant never received any proofs of the death of the insured under said policy. No claim was ever made under said policy or no objection was ever made by anybody to the settlement of the indebtedness under said policy in the manner indicated in the
82 letter of December 17, 1907. No one ever offered to pay any of the indebtedness under said policy after the 17th day of December, 1907. All parties treated the indebtedness as paid by satisfying it out of the reserve held by the defendant on the policy after its lapse for the non-payment of the premium due October 20, 1907. No person did anything inconsistent with said position under which the debt was so satisfied and the policy canceled, so far as I know. The defendant is a mutual company, doing business on the purely mutual plan; it has no shares of stock. The defendant has dealt with other policy-holders of the same class who received loans upon their policies precisely the same way as the defendant dealt with the beneficiary and the insured under this policy.

GEORGE C. NEWTON, being duly sworn and examined on the part of the defendant, by deposition testified as follows:

My name is George C. Newton; I am fifty years of age; I reside at New Brighton, New York, and I am superintendent of the Division of Policy Loans of the New York Life Insurance Company. I

have been superintendent of the Division of Policy Loans of the New York Life Insurance Company for the past fifteen years. My duties as such are to supervise and make loans on policies; that is to say, I receive the application- for loans, loan agreements, and the policies, and pass on the question of the loan, and make the loan when the policy so provides and the papers are properly executed.

On August 13, 1903, I received in my division a written application for a loan on the policy in controversy, the original of
83 which is marked as Ballard's Exhibit "D." After examining the policy, I accepted on behalf of the defendant the application for this loan and received at the Home Office the insured's loan agreement, marked Ballard's Exhibit "E." At the time I received the loan agreement, marked Ballard's Exhibit "E," I also received the original policy, marked Ballard's Exhibit "C." I then caused to be drawn up the defendant's check for the net proceeds of the loan, $486.91, on the company's bank account in the National City Bank in New York, and transmitted it through the mails to the insured. The original canceled check (Ballard's Exhibit "F," being the original canceled check), by which the proceeds of the loan were paid to the insured. The next year, on November 4, 1904, I received in my division an application for a new loan on said policy, which application has been marked and identified as Ballard's Exhibit "G." On receipt of this application marked Ballard's Exhibit "G," I went over the papers and accepted this application, and also received a loan agreement by the insured and the beneficiary, marked Ballard's Exhibit "H." The insured and the beneficiary gave written directions for the payment of the proceeds of this second loan, as set forth in Ballard's Exhibit "I." I satisfied the previous loan of $490.00 out of the new loan, deducted the interest therefrom in advance from the date of the loan to the next anniversary of the policy, amounting to $43.10, and deducted also the cost of insurance for one year from October 20, 1904, on the policy, plus gross interest from October 20th to the date of the loan, amounting to 90 cents, making in all $264.80, and on the 14th day of November, 1904, sent the insured by mail from the defendant's Home Office
84 its check No. 73825 on the Hanover National Bank of New York for the balance of the loan, $92.10. The original canceled check for said sum being marked as Ballard's Exhibit "J." Thereafter, on October 16, 1905, I received in my division an application by the insured and the beneficiary for a new loan of $1,135.00 on the policy, which I accepted on behalf of the defendant, and I also received the loan agreement of the insured and the beneficiary. The application for the new loan and the loan agreement to which I refer are marked as Ballard's Exhibits "K" and "L," respectively. In connection with this loan I received the written directions of the insured and the beneficiary for the disposition of the proceeds of the loan, which written directions are marked Ballard's Exhibit "M." Out of this loan we paid the previous loan of $890.00 and applied the balance to the payment of the premium due October 20, 1905. The balance not being sufficient to pay the full amount of that premium, the unpaid part of the

premium was paid by the insured in cash. On November 12, 1906, I received in my division at the Home Office a further application for a loan on this policy signed by the insured and the beneficiary, which is marked Ballard's Exhibit "N." I also received at that time a loan agreement signed by the insured and the beneficiary, which is marked Ballard's Exhibit "O." I accepted this application for the loan and applied the proceeds in accordance with the written direction of the insured and the beneficiary, marked Ballard's Exhibit "P". The proceeds of the loan were applied as requested in Ballard's Exhibit "P," and the balance of the premium and interest was paid in cash. After I made each of the foregoing loans I transmitted the papers to the defendant's Division of Policy Loan Securities, where all such securities are kept.

85 GEORGE C. SMITH, being sworn and examined on the part of the defendant, by deposition testified as follows:

My name is George C. Smith; I am sixty-two years of age; I reside in New York City, and I am superintendent of the Division of Policy Loan Securities of the defendant. I have been superintendent of that division of the defendant company for about ten years. My duties as much superintendent are to receive the policy loan agreements and policies after defendant's Division of Policy Loans makes a loan on the policies, to handle the transaction after the loan is made unless a new loan is made, in which event the papers are transmitted to the Division of Policy Loans for that purpose and then returned to me.

My division took charge of the papers pertaining to the loan transactions on policy No. 2054961 on the life of Josiah B. Dodge, and held them under the company's rules of practice down to the time of the foreclosure of the loan in 1907. Early in December, 1907, I received a notification form another department of the defendant company that the policy had lapsed for the non-payment of the premium due October 20, 1907, and that the current loan interest had not been paid. Thereupon, in the regular course of the defendant's business, I applied to the Actuary Department of the defendant company for a statement from that department of the amount of the reserve held by the company on the policy at the time of its lapse for the non-payment of said premium. After receiving this information from the Actuary Department I foreclosed the loan by satisfying it out of the reserve held by the company on this policy, which reserve was a little less than the amount
86 of the loan, and caused the fact of the foreclosure to be stamped on the left margin of the loan agreement. This was done about the 17th of December, 1907, and on the same date I caused to be mailed to the insured at his last known post office address a letter advising him of what had been done. Papers marked Ballard's Exhibit "C" and the loan agreement, marked Ballard's Exhibit "O," are the papers which I refer to in my last answer. Part of Ballard's Exhibit "O" stamped in red ink on the left margin thereof, consisting of the words "Foreclosed and paid by deducting the amount of the debt from the value of the policy—John C. Mc-

Call, Secretary," were placed there under my supervision. Paper marked Ballard's Exhibit "Q" is a copy of the letter which I caused to be mailed to the insured under date of December 17, 1907. After the mailing of this letter I heard nothing of this transaction until the bringing of this suit. No one offered to pay any part of the principal and interest of the loan after December 17, 1907, and no one ever expressed any dissatisfaction about the transaction after December 17, 1907. Before I mailed the letter of December 17, 1907, a copy of which is marked Ballard's Exhibit "Q," I foreclosed the loan by satisfying it out of the reserve held by the defendant on the policy, and the indebtedness was canceled on the company's books and has always remained canceled. Neither the insured nor the beneficiary, nor any person purporting to represent them, ever made any objection or exception as to what had been done. No communications from the beneficiary, or any one on her behalf, were ever received by the defendant company except those which have been produced and identified by Mr. Ballard in his deposition.

87 NORMAN R. HASKELL, of lawful age, being sworn and examined on the part of the defendant, by deposition testified as follows:

My name is Norman R. Haskell; I am fifty-two years of age; I reside in Brooklyn, New York, and I am superintendent of the Division of Policy Claims of the defendant company. I have been superintendent of the Division of Policy Claims of the defendant for about ten years. My duties as such superintendent are to receive all notices of deaths of insured, to receive all claims on policies, and to pay all claims received by the defendant which are just.

Defendant did not receive any proofs of death of the insured under policy No. 2054961. I never had anything to do with this particular policy until October 13, 1914. On that date the company received in my division a letter signed by one J. J. O'Donohoe, the original of which has been produced and marked as Ballard's Exhibit "R." I answered Ballard's Exhibit "R" under date of October 15, 1914, a copy of my answer being marked Ballard's Exhibit "S." I received another letter on the 19th day of October, 1914, marked Ballard's Exhibit "T." I referred this letter to our general counsel, Mr. McIntosh, for instructions as to whether or not I should give the information called for by the letter, and Mr. McIntosh wrote thereon the word "Yes" and his initials, "J. H. M.," as they now appear. Thereupon, on October 23rd, I sent a letter to Mr. O'Donohoe, a copy of which is marked Ballard's Exhibit "U." I received an answer to Ballard's Exhibit "U," which has heretofore been produced and identified as Ballard's Exhibit "V." I answered

88 Ballard's Exhibit "V" on October 14, 1914, and a copy of my answer is marked as Ballard's Exhibit "W." I received another letter on November 4, 1914, which is marked as Ballard's Exhibit "X" and another letter on the 18th of November, 1914, which is marked Ballard's Exhibit "Y." I answered Ballard's Exhibit "Y" on November 19, 1914, a copy of my answer being marked Ballard's Exhibit "Z." I received another letter on

November 23, 1914, which has been identified and marked as Ballard's Exhibit "AA." These letters are all the correspondence that I had anything to do with and all that I know of or heard anything about.

ARTHUR R. GROW, being produced, sworn and examined on the part of the defendant, by deposition testified as follows:

My name is Arthur R. Grow; I am fifty-six years of age; I reside at East Orange, New Jersey, and I am actuary for the defendant company. I have been actuary for the defendant for more than ten years. I have been employed by the defendant in an actuarial capacity for more than thirty years. Since I became actuary of the defendant my duties are such as devolve upon an actuary of a life insurance company—the calculation of premiums, dividends, policy reserves, the preparation of policy forms, contract forms generally and all the actuarial work incident to the business of life insurance.

I am familiar with policy No. 2054961, issued by the defendant on the life of Josiah B. Dodge. This policy was a policy on the twenty-year endowment, twenty-year accumulation plan, carried by the defendant in what it called the AA-2 class as to profits. It was
on the defendant's regular form adopted in 1899 for twenty-
89 -year endowment policies, and it was taken out on the life of Josiah B. Dodge as of age thirty-six, for $5,000.00, calling for a premium of $69.95, payable on the 20th of October, 1900, and on the 20th of January, April, July and October in every year thereafter until twenty full years' premiums should have been paid thereunder; the quarterly premium of $69.95 being the equivalent of an annual premium payable October 20th of $263.90, and the policy was payable in the event of the death of the insured before the end of the endowment period to Leo F. Dodge, wife of the insured. The reserve on this policy held by the defendant on October 20, 1907, amounted to $1,348.85. This reserve was on the basis of the American Experience Table of Mortality, with interest at 3 per cent. I am familiar with the laws of the several states on the question of surrender values required by law for policies of life insurance. I am familiar with the surrender value of lapsed policies. The surrender value of lapsed policies is one of the things that especially comes within the experience and work of an actuary. A reasonable and fair surrender value of a twenty-year endowment policy taken out in 1900 which lapsed for the non-payment of the premium that became due in 1907 would be two-thirds of the reserve on the policy at the time of the lapse, computed on the American Experience Table of Mortality, with interest at 4½ per cent per annum. The reserve on this policy on the 23rd day of October, computed on the American Experience Table of Mortality, with interest at 4½ per cent, would be $1,208.25. Two-thirds of that amount would be $805.50. Defendant allowed on this policy a surrender value of $1,350.00, with 5 per cent interest thereon from October 20th to
December 17th. The laws of New York at the time policy
90 in suit was taken out fixed a surrender value for the surrender of a policy after lapse of two-thirds of the reserve on

the policy at the time of the lapse, computed according to the American Experience Table of Mortality, with interest at the rate of 4½ per cent. The surrender value allowed by the defendant for this policy was more than is ordinarily allowed by other insurance companies for the surrender of lapsed policies. It was more than is required by the law of any state pertaining to the surrender value of policies. Policy No. 2054961 was one of a class of similar policies issued and carried by the defendant. They were all of the same form. The form was adopted in 1899. Defendant made loans on other policies in this class. These loans were made on the same terms as the loan made on this particular policy. Upon the lapse of any policies of this class for the non-payment of premium, defendant took the same action as it did under this particular policy.

JAMES H. MCINTOSH, of lawful age, being produced, sworn and examined on the part of the defendant, by deposition testified as follows:

My name is James H. McIntosh; I am fifty-seven years of age; I reside in the City of New York, State of New York. I am an attorney and counselor at law employed as general counsel of the defendant. I have been attorney and counselor at law since June, 1886 and have been general counsel of the defendant ever since the title was created several years ago, and in the defendant's employ at its Home Office ever since July 1, 1903. I am familiar with the law of life insurance so far as there is a law of life insurance. I think I am also familiar with the law of contracts, which I under-
91 stand to be the law applicable to contracts of life insurance. In so far as the business of life insurance is controlled by statutory law it is my duty to keep myself familiarized with the statutes of the various states on life insurance, and I think I am fairly familiar with those statutes. I am a member of the bar of the State of New York. I am familiar with the laws of New York with respect to pledge and collateral securities. I have given very particular attention to this aspect of the law of New York. The defendant that I am working for has outstanding loans aggregating more than $150,000,000, secured by policies as collateral, and in connection with the terms of its policies with respect to loans its methods of handling loans secured by the pledge of its policies, or the value thereof as security for such loans and in connection with the preparation of policy loan agreements and the handling thereof, it has been my duty to study, and I have very extensively and carefully studied the laws of New York with respect to policy loans, policy loan securities and the satisfaction of loans secured by policies and the like.

I am familiar with defendant's policy No. 2054961 on the life of Josiah B. Dodge in controversy in this suit. I gained that familiarity from an examination of the original policy, which has been heretofore produced by Mr. Ballard. I am familiar with the loans that have been made on that policy and the way the defendant has handled the transaction as testified by the other witnesses. I gained that familiarity from an examination of the defendant's records of the transaction, and interrogated the witnesses who testified for the

defendant in this case. The procedure of the defendant with
92 respect to the loans on the policy in suit and the satisfaction of the loan out of the reserve held by the defendant in the manner testified to by Mr. Smith and Mr. Ballard conformed in every way to the laws of New York and constituted under the laws of New York a legal, valid and binding foreclosure of a pledge. There is no statute or decision of the courts of New York, or any law of New York, to my knowledge, which in any way prohibits, qualifies or invalidates the foreclosure of a pledge in the way of the pledge in policy in controversy was foreclosed, as stated by Mr. Smith and Mr. Ballard. The surrender value of lapsed policies at the time the policy in controversy was taken out was fixed by Section 88 of Chapter 690 of the Laws of New York passed in the year 1892, as published by Banks & Bros., Publishers, in 1892. The published volume in which this statute appears will probably be found in any public law library in the country, but for convenience I attach a copy of it herewith, which is marked as McIntosh's Exhibit "A."

Defendant thereupon offered in evidence McIntosh's Exhibit "A."

McIntosh's Exhibit "A."

Section 88. Surrender Value of Lapsed or Forfeited Policies.—Whenever any policy of life insurance issued after January first, eighteen hundred and eighty, by any domestic life insurance corporation after being in force three full years, shall, by its terms, lapse or become forfeited for the non-payment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed according to the American Experience
93 Table of Mortality at the rate of four and one-half per cent per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued, and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of forfeiture, or to purchase upon the same life at the same age paid-up insurance payable at the same time and under the same conditions, except as to payments of premiums, as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied to either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy.

The reserve hereinbefore specified shall include dividend additions calculated at the date of the failure to make any of the payments above described according to the American Experience Table of Mortality, with interest at the rate of four and one-half per cent per annum after deducting any indebtedness of the insured on ac-

count of any annual or semi-annual or quarterly premium then due, and any loan made in cash on such policy, evidence of which is acknowledged by the insured in writing.

The net value of the insurance given for such single premium under this section, computed by the standard of this state, shall in no case be less than two-thirds of the entire reserve computed
94 according to the rule prescribed in this section after deducting the indebtedness as specified; but such insurance shall not participate in the profits of the corporation.

If the reserve upon any endowment policy applied according to the provisions of this section as a single premium of temporary insurance be more than sufficient to continue the insurance to the end of the endowment term named in the policy, and if the insured survive that term, the excess shall be paid in cash at the end of such term, on the conditions on which the original policy was issued.

This section shall not apply to any case where the provisions of the section are specifically waived in the application and notice of such waiver is written or printed in red ink on the margin of the face of the policy when issued.

(Notarial Seal.) I. T. No. 64 Kings County. Certificate filed in New York Co No. 79. My commission expires March 30, 1916.

The method of calculating the surrender values of lapsed policies under Section 88 of the Insurance Law of New York is and has always been to construe said section as requiring the company under the conditions stated therein to give a surrender value of not less than two-thirds of the reserve on the policy, computed according to the American Experience Table of Mortality, with interest at the rate of 4½ per cent per annum, that part of the secoin being as follows:

"The net value of the insurance given for such single premium under this section, computed by the standard of this State, shall in no case be less than two-thirds of the entire reserve, computed according to the rule prescribed in this section, after deducting the indebtedness as specified."

95 The taking of two-thirds of said reserve as the surrender value gives effect to all the language of the section and conforms to the immemorial practice of life insurance companies generally and everywhere with respect to making a surrender charge in fixing a surrender value for lapsed policies. At the time the policy in controversy was taken out there was a law of the State of New York with respect to discrimination between policy-holders of the same class and equal expectation of life. The law prohibiting any discrimination between policy-holders of the same class and equal protection of life is known as Section 89 of Chapter 690 of the Laws of New York, passed in 1892, as published by Banks Bros., Publishers, in 1892, immediately following section 88 of said law about which I have already testified. A copy of said Section 89 of the

laws of New York is hereto attached and marked as McIntosh's Exhibit "B."

Defendant thereupon offered in evidence McIntosh's Exhibit "B."

McIntosh's Exhibit "B."

Section 89. Discriminations Prohibited.—No life insurance corporation doing business in this state shall make any discrimination in favor of individuals of the same class or of the same expectation of life either in the amount of premium charged or in any return of premium, dividends or other advantages.

This is all the testimony offered by defendant.

At the close of all the testimony in the case the defendant asked the Court for the following declaration of law:

The Court declares the law to be that under the pleadings
96 and the evidence at the close of the whole case its findings must be for the defendant.

Which said declaration of law, so asked by the defendant at the close of all the testimony in the case, was, by the Court, refused; to which action of the Court in refusing said declaration of law so asked by the defendant the defendant, in open court, by counsel, objected and excepted at the time.

The defendant then asked the Court for the following declarations of law:

Defendant's Declarations of Law Refused.

III.

The Court declares the law to be that before the plaintiff can recover in this case proofs of the death of the insured must have been submitted to the defendant company within ninety days after the insured's death, as required by Section 7899, R. S. Mo. 1899, and that at there is no evidence in this case that proofs of death were submitted to the defendant company within ninety days after the insured's death, its findings must be for the defendant.

III*a*.

The Court declares the law to be that unless it believes and finds from the evidence that proofs of death were submitted to the defendant company within ninety days after the insured's death, then its findings must be for the defendant.

IV.

The Court declares the law to be that if it believes and finds
97 from the evidence that on or about the 20th day of October, 1900, the defendant herein issued its policy sued on in this case to one Josiah B. Dodge of the City of St. Louis, Missouri, in

which the plaintiff herein was designated as beneficiary, and that on or about the 21st day of August, 1903, the insured and the plaintiff herein borrowed from the defendant company on said policy the sum of $490.00, and that said policy was pledged to the defendant company to secure the repayment of said loan as aforesaid, and that thereafter the insured failed to pay the premium due under said policy on October 20, 1907, and that between August 21, 1903, and October 20, 1907, loans made to the insured under said policy and the plaintiff herein by the defendant company had increased to the sum of $1,350.00, and that the principal of the loan of $1,350.00 and the interest thereon were outstanding and unpaid on October 20, 1907, then its findings must be for the defendant.

VI.

The Court declares the law to be that Section 7897, R. S. Mo. 1899, is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, because it denies to the defendant company the equal protection of the laws, and therefore its findings must be for the defendant.

VII.

The Court declares the law to be that Section 7897, R. S. Mo. 1899, is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, because
98 it deprives the defendant of its property without due process of law and, therefore, its findings must be for the defendant.

VIII.

The Court declares the law to be that Section 7897, R. S. Mo. 1899, is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States because it deprives the defendant of its liberty guaranteed to it by said amendment to the Federal Constitution, and, therefore, its finding must be for the defendant.

IX.

The Court declares the law to be that Section 7897, R. S. Mo. 1899, which provides that upon the non-payment of any premium subsequent to the third on all policies issued by a life insurance company authorized to do business in this State, said policy shall not be forfeited or become void, but that "the net value of the policy when the premium becomes due and is not paid shall be computed upon the Actuaries' or Combined Experience Table of Mortality with 4 per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company given on account of past premium payments on said policy issued to the insured, which indebtedness shall be then canceled, the balance shall

be taken as a net single premium for temporary insurance for the full amount written in the policy" as construed by the courts of the State of Missouri is unconstitutional and void because it fails to give full faith and credit to acts and transactions lawfully done in the State of New York, contrary to and in violation of Section 1 of
99 the Constitution of the United States, because said statute as construed by the courts of the State of Missouri abridges the privileges and immunities of this defendant as a citizen of the United States and of the State of New York, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Article IV, Section 2, of the Constitution of the United States, because said statute as construed by the courts of the State of Missouri deprives the defendant of its liberty and property without due process of law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of the Fifth Amendment to the Constitution of the United States, because it impairs the obligation of the contracts of insurance loans and pledges made between the parties hereto and performed by them, contrary to and in violation of Article I, Section 1, of the Constitution of the United States.

X.

The Court declares the law to be that Section 7068 of the Revised Statutes of Missouri for 1909, and the Act of March 30th, 1911, Laws of Missouri for 1911, in amendment of said section, are each void because in violation of Section 10, Article I, of the Constitution of the United States and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the plaintiff is not entitled to recover anything by way of attorney's fees and damages in this case.

XI.

The Court declares the law to be that Section 7068 of the
100 Revised Statutes of Missouri for 1909 and the Act of March 30, 1911, Laws of Missouri for 1911, in amendment of the said section are each void because in violation of Section 4 of Article II of the Constitution of Missouri, and of Section 10 of Article II of the Constitution of Missouri, and of Section 30 of Article II of the Constitution of Missouri, and plaintiff is not entitled to recover anything by way of attorney's fees and damages in this case.

XII.

The Court declares the law to be that Section 7068 of the Revised Statutes of Missouri, 1909, and the Act of March 30, 1911, Laws of Missouri for 1911, page 282, authorizing the imposition of damages and attorney's fees are unconstitutional and void because in violation of Section 10 of Article I of the Constitution of Missouri and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and of Section 30 of Article II and of Section 10 of

Article II of the Constitution of Missouri, and because the construction thereof by the courts of this State constitute a rule of judicial construction violative of said provisions of said Federal and State Constitutions, and because said Section 7068 of the Revised Statutes of Missouri, 1909, and the Act of March 30, 1911, as aforesaid, if applied to this case, deny the defendant due process of law as guaranteed to it by said Federal and State Constitutions.

XIII.

The Court declares the law to be that if it believes and finds from the evidence that on or about the 20th day of October, 1900,
101 the defendant herein issued the policy sued on to Josiah B. Dodge, of the City of St Louis, Missouri, in which the plaintiff herein was designated as beneficiary, and that on or about the 21st day of August, 1903, the insured and the plaintiff herein borrowed from the defendant on said policy the sum of $490.00, and that said policy was pledged to the defendant company to secure the payment of said loan as aforesaid, and that thereafter the insured failed to pay the premium due on said policy on October 20, 1907, and that between August 21, 1903, and October 20, 1907, loans were made to the insured under said policy and the plaintiff herein by the defendant company, which had increased to the sum of $1,350.00, and that the principal of said amount of $1,350.00 and the interest thereon were outstanding and unpaid on October 20, 1907, and if you believe and find from the evidence that upon the non-payment of the premium due under said policy on October 20, 1907, the defendant company foreclosed the pledge of said policy by satisfying the outstanding loan thereunder from the reserve or net value of said policy on October 20, 1907, and if you believe and find from the evidence that on October 20, 1907, the reserve or net value of said policy computed upon either the American Experience Table of Mortality with 4 per cent interest per annum, or the American Experience Table of Mortality with 3 per cent interest per annum, or the Actuaries' or Combined Table of Mortality with 4 per cent interest per annum, was less than the amount of the outstanding and unpaid loan on said policy on October 20, 1917, then its findings must be for the defendant.

Which said declarations of law numbered III, III-*a*, IV, VI, VII, VIII, IX, X, XI, XII and XIII, so asked by the defendant,
102 were, by the Court, refused; to which action of the Court in refusing said declarations of law the defendant, in open court, by counsel, objected and excepted at the time.

The Court then found the issues in favor of the plaintiff, as follows:

On insurance policy	$1,983.45
For attorney's fees	250.00
Total	$2,233.45

The Court then rendered judgment in accordance with its findings. To which action of the Court in so rendering judgment in favor of the plaintiff the defendant, in open court, by counsel, objected and excepted at the time.

And afterwards, to-wit, at the said May Term, A. D. 1916, of the said Circuit Court of Phelps County, Missouri, and on the 4th day of May, A. D. 1916, and within four days of said trial, the defendant filed its motion for a new trial in said cause.

Which said motion for a new trial is as follows:

Defendant's Motion for New Trial.

STATE OF MISSOURI,
County of Phelps, ss:

In the Circuit Court of Phelps County, Missouri, May Term, 1916.

LEO F. DODGE, Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, Defendant.

Now comes the defendant, New York Life Insurance Com-
103 pany, and moves the Court to set aside its findings and judgment rendered herein and to grant it a new trial for the following reasons, to-wit:

First. Because the Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff, and over the objection of the defendant.

Second. Because the Court erred in excluding competent, relevant and admissible evidence offered by the defendant.

Third. Because the Court erred in overruling a declaration of law in the nature of a demurrer to the evidence requested by the defendant at the close of the plaintiff's case.

Fourth. Because the findings and judgment of the Court is against the evidence and the weight of the evidence presented at the trial.

Fifth. Because the findings and judgment of the Court is against the law.

Sixth. Because the findings and judgment of the Court is against both law and the evidence.

Sventh. Because the Court erred in giving erroneous, illegal, improper, prejudicial and misleading declarations of law on behalf of the plaintiff and over the objection of the defendant thereto, and erred in giving each and every one of the declarations of law requested by plaintiff.

Eighth. Because the Court erred in refusing to give legal and proper declarations of law requested by the defendant.

Ninth. Because the Court erred in refusing to give declarations of

law numbered I, II, III, III-*a*, IV, VI, VII, VIII, IX, X, XI, XII and XIII, requested by the defendant.

Tenth. Because the Court erred in refusing to hold and
104 in refusing to declare as a matter of law that Section 7897, R. S. Mo. 1899, is unconstitutional and void because in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 10, Article I, of the Constitution of the United States.

Eleventh. Because the Court erred in refusing to hold and in refusing to declare as a matter of law that Section 7897, R. S. Mo. 1899, as construed by the courts of Missouri, is unconstitutional and void because it fails to give full faith and credit to acts and transactions lawfully done in the State of New York, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States because said statutes as construed by the courts of Missouri abridges the privileges and immunities of this defendant as a citizen of the United States and the State of New York, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States Article IV, Section 2, of the Constitution of the United States, and because said statute as construed by the courts of Missouri deprives the defendant of its liberty and property without due process of law and denies to the defendant the equal protection of the laws, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Fifth Amendment to the Constitution of the United States.

Twelfth. Because the Court erred in refusing to hold and in refusing to declare as a matter of law that Section 7068, R. S. Mo. 1909, and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof, authorizing the imposition of damages and attorney's fees, is unconstitutional and void because in
105 violation of Section 10 of Article I, of the Constitution of the United States, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in violation of Section 30 of Article II, and Section 10 of Article II, of the Constitution of Missouri, and because the construction thereof by the courts of Missouri constitutes a rule of judicial construction in violation of said provisions of said State and Federal Constitutions, and because said Section 7068, R. S. Mo. 1909, and the Act of March 30, 1911, Laws of Missouri 1911, page 282, if applied to the facts of this case, deny to the defendants due process of law as guaranteed to it by said State and Federal Constitutions.

JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Defendant.

Which said motion for a new trial was, at the said May Term, A. D. 1916, of the said Circuit Court of Phelps County, Missouri, and on the said 4th day of May, A. D. 1916, by the Court overruled; to which action of the Court in overruling said motion for a new trial the defendant, in open court, by counsel, objected and excepted at the time.

And afterwards, to-wit, at the said May Term, A. D. 1916, of the said Circuit Court of Phelps County, Missouri, and on the said 4th day of May, A. D. 1916, the Court, by its order duly entered of record, gave defendant, New York Life Insurance Company, leave to file its bill of exceptions in vacation of said court, at any time within one hundred and twenty (120) days from this date.

And afterwards, to-wit, at the said May Term, A. D. 1916, of the said Circuit Court of Phelps County, Missouri, and on the
106–110 said 4th day of May, A. D. 1916, the defendant, New York Life Insurance Company, filed its affidavit for an appeal in said cause. The attorneys for the defendant, New York Life Insurance Company, then asked the Court that its appeal in this case be allowed to the Supreme Court of Missouri, which request was, by the Court, denied; to which ruling of the Court the defendant objected and excepted. Which said affidavit for appeal, being taken up, considered and adjudged to be sufficient, it is ordered by the Court that the defendant, New York Life Insurance Company, be allowed an appeal in this cause to the Springfield Court of Appeals.

The defendant thereupon and during the May Term, A. D. 1916, filed its appeal bond, which had been approved by the plaintiff's attorneys.

And the defendant, New York Life Insurance Company, now and within the time allowed by the Court, presents this, its bill of exceptions, and prays that the same may be examined, allowed, signed, ordered filed, filed and made a part of the record in this cause; which is done this the 12th day of June, A. D. 1916.

L. B. WOODSIDE,
Judge Circuit Court of Phelps County, Missouri.

Approved:
LORTS & BRUER AND
JAMES J. O'DONOHOE,
Attorneys for Plaintiff.

* * * * * * *

111 *Amended Petition.*

Leo F. Dodge, for her amended petition, states that she is the plaintiff in the above-styled cause, and that the defendant is now and was at all of the dates hereinafter mentioned a corporation duly organized and incorporated under and by virtue of the laws of the State of New York; that at all of said dates and prior thereto defendant was and still is a resident and citizen of the State of Missouri, and pursuant to the laws of the State of Missouri defendant maintains and has at all of said dates maintained several offices in the State of Missouri; that at all of said dates, prior and subsequent thereto, the defendant was and now is transacting the business of life insurance in the State of Missouri; that the defendant thereby became subject to and thereby agreed to be bound by all the laws of the State of Missouri then in force or thereafter enacted.

Plaintiff further states that on or about the 23rd day of August,

1900, Josiah B. Dodge, a resident and citizen of the State of Missouri, at said City of St. Louis, State of Missouri, made written application to defendant for a policy of insurance, and upon said written application, on or about the 20th day of October, 1900, defendant, at the City of St. Louis, in the State of Missouri, issued its written policy of insurance No. 2054961, by which said policy, in consideration of the premiums therein stated, defendant insured the life of the said Josiah B. Dodge, and promised to pay, in the event of his death before the 20th day of October, 1920, to plaintiff, if then living, otherwise to the insured's executors, ad-
112 ministrators or assigns, or to such other beneficiary designated by the insured, the sum of five thousand dollars ($5,000) immediately upon receipt and approval of proofs of the death of the said Josiah B. Dodge; that at the time said policy was issued, prior thereto and up to his death, Josiah B. Dodge, the insured, was a resident and citizen of the State of Missouri, and that he died on the 12th day of February, 1912, and that every condition of said policy was complied with by the insured during his lifetime, and by the plaintiff since his death; that plaintiff was the wife and is now the widow of said insured; that she is now and was at all of the dates herein named a resident and citizen of the State of Missouri.

Plaintiff further states that Josiah B. Dodge, the insured, continued to pay premiums on said policy until the 20th day of October, 1907, when the said insured discontinued the payment of further premiums; that at the time of the lapse, namely, on the 20th day of October, 1907, more than three full annual premiums had been paid on said policy, to-wit, seven annual premiums had been paid thereon, and the net value of said policy, at date of lapse—October 20th, 1907—under the statutes of the State of Missouri in such cases made and provided, amounted to the sum of one thousand two hundred and fifty-seven dollars and twenty-five cents ($1,257.25), three-fourths of which said sum ($942.94), applied as a net single premium, as provided by said statutes, extended said policy from date of lapse (October 20th, 1907) for a term of thirteen years, being the end of the endowment term, and left sufficient excess of said three-fourths of said net value, when considered
or taken as a net single premium, to purchase a pure endow-
113 ment of five hundred and seven dollars and sixty-seven cents ($507.67).

Plaintiff further states that, including the whole of the year's premium in which the insured died there were five annual premiums unpaid on said policy, and the amount of each, with dates when due, follow:

October 20th, 1907	$263.90
October 20th, 1908	263.90
October 20th, 1909	263.90
October 20th, 1910	263.90
October 20th, 1911	263.90
Total unpaid premiums	$1,319.50

Plaintiff further states that said unpaid annual premiums amount to the sum of one thousand, three hundred and nineteen dollars and fifty cents ($1,319.50), and the interest, compounded thereon at the rate of 6 per cent per annum, as provided by statute, amounts to the sum of one hundred and ninety-six dollars and eighteen cents ($196.18); that the unpaid premiums ($1,319.50), added to the compounded interest ($196.18), totals the sum of one thousand, five hundred and fifteen dollars and sixty-eight cents ($1,515.68).

Plaintiff further states that on or about the 29th day of August, 1903, Josiah B. Dodge, the insured, at the City of St. Louis, in the State of Missouri, made written application to defendant for a loan of four hundred and ninety dollars ($490.00), and at said city and state the said insured signed and executed a loan agreement therefor, and on or about the 20th day of October, 1903, the defendant, at said City of St. Louis, Missouri, pursuant to said application and loan agreement, lent to the said insured the said sum of
114 four hundred and ninety dollars ($490.00) at an agreed rate of interest of 5 per cent per annum; that the proceeds of said loan were paid and applied in said City of St. Louis, Missouri, as follows: The defendant paid the insured four hundred and eighty-six dollars and ninety-one cents ($486.91) and applied three dollars and nine cents to interest on said loan.

Plaintiff further states that on or about the 2nd day of November, 1904, Josiah B. Dodge, the insured, and Leo F. Dodge, the plaintiff herein, at the City of St. Louis, Missouri, made written application to defendant for a loan of eight hundred and ninety dollars, and in said city and state they signed and executed a loan agreement therefor, and on or about the 14th day of November, 1904, the defendant, at said City of St. Louis, Missouri, pursuant to said application and loan agreement, lent to them the said sum of eight hundred and ninety dollars ($890.00) at an agreed rate of interest of 5 per cent per annum; that the proceeds of said loan were paid and applied in the City of St. Louis, Missouri, as follows: $263.90 to pay the annual premium due and payable on the 20th day of October, 1904; 90 cents to pay grace interest; $43.20 to pay policy loan interest; $490.00 to satisfy prior loan, and $92.10 paid to the insured and plaintiff.

Plaintiff further states that on or about the 26th day of September, 1905, Josiah B. Dodge, the insured, and Leo F. Dodge, plaintiff herein, at the City of St. Louis, Missouri, made written application to defendant for a loan of one thousand, one hundred and thirty-five dollars, and in said city and state they signed and executed a loan agreement therefor, and on or about the 16th day of October, 1905, the defendant, at said City of St. Louis, Missouri,
115 pursuant to said application and loan agreement, lent to them the said sum of one thousand, one hundred and thirty-five dollars, at an agreed rate of interest of 5 per cent per annum; that the proceeds of said loan was paid and applied at said City of St. Louis, Missouri, as follows: $890.00 to satisfy prior loan;

$56.75 to pay interest on said loan to October 20th, 1906, and $188.25 credited on the October 20th, 1905, premium.

Plaintiff further states that on or about the 9th day of November, 1906, Josiah B. Dodge, the insured, and Leo F. Dodge, the plaintiff herein, at the City of St. Louis, Missouri, made written application to defendant for a loan of one thousand, three hundred and fifty dollars, and in said city and state they signed and executed a loan agreement therefor, and on or about the 15th day of November, 1906, the defendant at said City of St. Louis, Missouri, pursuant to said application and loan agreement, lent to them the said sum of one thousand, three hundred and fifty dollars at an agreed rate of interest of 5 per cent per annum; that the proceeds of said loan were applied at said City of St. Louis, Missouri, as follows $1,135.00 to discharge prior loan; $67.50 to pay interest on said loan to the 20th day of October, 1907, and $147.50 credited on the annual premium due on the 20th day of October, 1906, and the balance of said premium, namely, $116.40, was paid by the insured to defendant in cash; that interest on said loan of $1,350.00 at the stipulated rate of 5 per cent per annum is due and unpaid from the 20th day of October, 1907, to the 12th day of February, 1912 (four years, three months and twenty-three days), which amounts to the sum of $291.25, and when added to the loan of $1,350.00 aforesaid, totals the sum of $1,641.25.

116 Plaintiff further says that, as above stated, at the date the policy lapsed, namely, on the 20th day of October, 1907, the net value of said policy, under the Missouri non-forfeiture statutes in force when said policy was issued, amounts to the sum of $1,257.25; that three-fourths of said net value is $924.94; that deducting $667.15 (which is the aggregate amount which defendant even claims to have been applied out of all of said loans to pay or to partially pay premiums on said policy) leaves $275.79, which sum ($275.79), taken as a net single premium, as provided by the Missouri non-forfeiture statutes in force when said policy was issued, extends said policy from date of lapse, October 20th, 1907, for a period of five years and sixty-four days, and the insured died within said period, for he died on the 12th day of February, 1912, that is, four years, three months and twenty-three days from October 20th, 1907, date of lapse.

Plaintiff further states that while the defendant claims the sum of $667.15 was applied out of said loans to pay, or partially pay premiums, yet the truth is that only $599.65 was thus applied.

Plaintiff further states that the unpaid premiums ($1,319.50) and interest compounded thereon ($196.18), together with said loan ($1,350.00), and interest thereon ($291.25), aggregate the sum of three -sand, one hundred and fifty-six dollars and ninety-three cents ($3,156.93), and that the same may be deducted from the face amount of said policy, being, as plaintiff believes, a proper deduction under the non-forfeiture laws of the State of Missouri thus reducing said policy to the sum of one thousand, eight hundred and forty-three dollars and seven cents ($1,843.07).

Plaintiff further states that on sundry dates prior to the

117 institution of this suit the plaintiff duly demanded of defendant payment of said policy, but the said defendant on each occasion vexatiously refused to pay said policy, or any part thereof, and then and there vexatiously disclaimed all liability thereunder on the grounds that there was a default in the payment of premiums, and a default in the payment of the last loan aforesaid.

Wherefore, plaintiff prays judgment against defendant in the sum of one thousand, eight hundred and forty-three dollars and seven cents ($1,843.07), with interest thereon at the rate of 6 per cent per annum from the filing of this suit, namely, the 27th day of January, 1915, together with 10 per cent thereon as damages, and such further sum as may appear to be the reasonable value of her attorney's services, in preparing and prosecuting this action, because of the vexatious refusal of the defendant to pay said policy.

118 *Appellant's Assignment of Errors in the Springfield Court of Appeals.*

119 Assignment of Errors.

1. The Court below erred in refusing to hold and declare as a matter of law that Section 7897, R. S. Mo., 1899, is contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, Section 10, Article I, of the Constitution of the United States, Section 1, Article IV, of the Constitution of the United States and the Fifth Amendmen- to the Constitution of the United States, and is, therefore, unconstitutional and void.

2. The Court below erred in refusing to hold and declare as a matter of law that Section 7068, R. S. Mo., 1909, and the act of March 30, 1911 (Laws of Missouri, 1911, page 282), in amendment thereof, authorizing the imposition of damages and attorney's fees, are unconstitutional and void because in violation of Section 10 of Article I of the Constitution of the United States and of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 10 of Article II and Section 30 of Article II of the Constition of Missouri, and because the construction thereof by the Courts of Missouri constitutes a rule of judicial construction violative of said provisions of said State and Federal constitutions and because said statute, in its application to the facts in this case, denies the defendant due process of law and deprives it of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

3. The Court below erred in refusing to hold and declare as a matter of law that before the plaintiff is entitled to re-
120 & 121 cover under the provisions of Section 7897, R. S. Mo., 1899, notice of claim and proofs of the death of the insured must have been submitted to the defendant Company within ninety days after the insured's death as required by Section 7899, R. S. Mo., 1899.

122 In the Springfield Court of Appeals, October Term, 1916.

No. 1876.

LEO F. DODGE (Plaintiff), Respondent,

vs.

NEW YORK LIFE INSURANCE COMPANY (Defendant), Appellant.

Motion to Transfer Cause to Supreme Court of the State of Missouri.

Now comes the New York Life Insurance Company, appellant in the above entitled cause, and respectfully shows to the Court that this cause involves questions arising under the Constitution of the United States; that the appellant (defendant below) in its answer to the plaintiff's petition in this action asserted that Section 7897, R. S. Mo. 1899, upon which plaintiff's right of recovery under the policy of insurance sued on in this case is bottomed, is unconstitutional and void as being in violation of Article IV, Section 1, of the Constitution of the United States, Section 1 of the Fourteenth Amendment to the Constitution of the United States, Article IV, Section 2, of the Constitution of the United States, and Article V, and Section 1 of Article XIV, of the Amendments to the Constitution of the United States; that the Court below ruled adversely to appellant's contention in this regard and held such statute (Section 7897, R. S. Mo. 1899) to be constitutional and valid; to which action of the Court the appellant at the time duly excepted and saved its exceptions to the Court's ruling, as aforesaid, by asserting in its
123 motion for a new *for a new* trial, as grounds therefor, as follows:

"VI.

"The Court declares the law to be that Section 7897, R. S. Mo. 1899, is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, because it denies to the defendant company the equal protection of the laws, and therefore its findings must be for the defendant."

"VII.

"The Court declares the law to be that Section 7897, R. S. Mo. 1899, is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, because it deprives the defendant of its property without due process of law and, therefore, its findings must be for the defendant."

"VIII.

"The Court declares the law to be that Section 7897, R. S. Mo. 1899, is unconstitutional and void and in violation of the Four-

teenth Amendment to the Constitution of the United States because is deprives the defendant of its liberty guaranteed to it by said amendment to the Federal Constitution, and, therefore, its finding must be for the defendant."

"IX.

"The Court declares the Law to be that Section 7897, R. S. Mo. 1899, which provides that upon the non-payment of any premium subsequent to the third on all policies issued by a life insurance company authorized to do business in this State, said policy shall not be forfeited or become void, but that 'the net value of the policy when the premium becomes due and is not paid shall be computed upon the Actuaries' or Combined Experience Table of Mor-ality with 4 per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company given on account of past premiums payments on said policy issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy' as construed by the courts of the State of Missouri is unconstitutional and void because it fails to give full faith and credit to acts and transactions lawfully done in the State of New York, contrary to and in violation of Section 1 of the Constitution of the United States, because said statute as construed by the courts of the State of Missouri abridges the privileges and immunities of this defendant as a citizen of the United States and of the State of New York, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Article LV, Section 2, of the Constitution of the United States, because said statute as construed by the courts of the State of Missouri deprives the defendant of its liberty and property without due process of law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of the Fifth Amendment to the Constitution of the United States, because it impairs the obligation of the contracts of insurance loans and pledges made between the
124 parties hereto and performed by them contrary to and in violation of Article I, Section 1, of the Constitution of the United States."

The appellant furthermore shows to the Court that at the trial of this cause it asserted that Section 7068, R. S. Mo. 1909, and the Act of March 30, 1911 (Laws of Missouri for 1911), in amendment thereof, authorizing the imposition of damages as attorneys' fees against defendant where the refusal to pay 'he policy was vexatious, were each void because in violation of the Fourteenth Amendment to the Constitution of the United States, Section 10 of Article I of the Constitution of the United States, Section 30 of Article II of the Constitution of Missouri, and Section 10 of Article II of the Constitution of Missouri, and because the construction thereof by the Courts of this State constitutes a rule of judicial construction violative of said provisions of said Federal and State Con-

stitutions; that the court below held Section 7068, R. S. Mo. 1909, and the Act of March 30, 1911, as aforesaid, to be constitutional and valid; to which action of the Court the appellant at the time duly excepted and saved its exceptions to the Court's ruling, as aforesaid, by asserting in its motion for a new trial, as grounds therefor, as follows:

"X.

"The Court declares the law to be that Section 7068 of the Revised Statutes of Missouri for 1909, and the Act of March 30th, 1911, Laws of Missouri for 1911, in amendment of said section, are each void because in violation of Section 10, Article 1, of the Constitution of the United States and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the plaintiff is not entitled to recover anything by way of attorney's fees and damages in this case."

"XI.

"The Court declares the law to be that Section 7068 of the Revised Statutes of Missouri for 1909 and the Act of March 30, 1911, Laws of Missouri for 1911, in amendment of said section are each void because in violation of Section 4 of Article II of the Constitution of Missouri, and of Section 10 of Article II of the Constitution of Missouri, and of Section 30 of Article II of the Constitution of Missouri, and plaintiff is not entitled to recover anything by way of attorney's fee and damages in this case."

124½ "XII.

"The Court declares the Law to be that Section 7068 of the Revised Statutes of Missouri, 1909, and the Act of March 30, 1911, Laws of Missouri for 1911, page 282, authorizing the imposition of damages and attorney's fees are unconstitutional and void because in violation of Section 10 of Article I of the Constitution of Missouri and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and of Section 30 of Article II and of Section 10 of Article II of the Constitution of Missouri, and because the construction thereof by the Courts of this State constitute a rule of judicial construction violative of said provisions of said Federal and State Constitutions, and because said Section 7068 of the Revised Statutes of Missouri, 1909, and the Act of March 30, 1911, as aforesaid, if applied to this case, deny the defendant due process of law as guaranteed to it by said Federal and State Constitutions."

The appellant further states that its motion for a new trial was overruled by the court below, and that the actions of the court below in holding Section 7897, R. S. Mo. 1899, and Section 7068, R. S. Mo. 1909, and the Act of March 30, 1911 (Laws of Missouri for 1911, page 282), to be constitutional and valid, are errors assigned

in appellant's brief to the ruling and judgment of the court below; that this case presents a case arising under the Constitution of the United States and the Constitution of Missouri, and that therefore this Court, under and by virtue of the Constitution and statutes of the State of Missouri, has no jurisdiction of this cause.

Wherefore, and by reason of the foregoing, the appellant moves the Court to transfer this cause to the Supreme Court of the State of Missouri.

JONES, HOCKER, SULLIVAN & ANGERT,
Attorneys for Appellant.

On back of original motion appears the following, to-wit:

Received copy of the within motion this 6th day of September, 1916.

LORTS & BREUER,
JAMES J. O'DONOHOE,
Attorneys for Respondent.

125 Nov. 20, 1916.

In the Springfield Court of Appeals, October Term, 1916.

No. 1876.

LEO F. DODGE, Respondent,

v.

NEW YORK LIFE INSURANCE COMPANY, Appellant.

Appeal from Phelps Circuit Court.

Hon. L. B. Woodside, Judge.

Jones, Hocker, Sullivan & Angert, and James C. Jones, Jr., all of St. Louis; James H. McIntosh of New York, for Appellant.

Lorts & Breuer of Rolla, James J. O'Donohoe of St. Louis, for Respondent.

Affirmed.

FARRINGTON, *J.*:

The defendant company appeals from a judgment rendered against it in a suit founded on a policy of life insurance issued on October 20, 1900, on which had been paid seven annual premiums after which the premium payments were discontinued by the assured.

Under the non-forfeiture laws of Missouri, after deducting loans which were applied to the payment of premiums from the reserve there remained a balance of $275.79 with which to pay a single premium for term insurance and which would extend the policy

for a length of time sufficient to cover the date of the death of the assured. It is uncontroverted that if merely the amount borrowed from the company, which was applied to the payment of premiums, is deducted from the reserve the balance would purchase sufficient extended insurance to carry the risk beyond the date of the death of the assured; and it is also uncontroverted that if all the indebtedness—not only that which was applied to the payment of premiums but an additional amount—were deducted from the reserve there would not have been a sufficient amount to have carried the policy in force up to the date of the death of the assured.

It is argued by the appellant that section 7897, R. S. 1899, is unconstitutional and void. This contention must be ruled
126 against the appellant as we held in the case of Mun v. New York Life Ins. Co., 181 S. W. 606, that the constitutionality of this statute was no longer a live question the same having been held to be constitutional in the case of Burridge v. Insurance Co., 211 Mo. 158, l. c. 180, 109 S. W. 560, and other cases cited in that opinion.

Appellant raises the proposition that section 7068, R. S. 1909, authorizing the imposition of damages and attorney fees, and the act of March 30, 1911 (Laws 1911, p. 282), are unconstitutional and void. This contention must likewise be decided against the appellant on authority of Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903, which held that the section complained of (then section 8012, R. S. 1899) was constitutional. (See, also, Barber v. Hartford Life Ins. Co. (Mo.), 187 S. W. 867.) The only change in that section that has been made was made in 1911 (Laws 1911, p. 282) which merely added other classes of insurance to those already named.

It is further contended that the court erred in submitting the question of whether a penalty should be imposed for vexatiously refusing to pay the loss, because, as contended by appellant, there is no evidence justifying such submission. As to whether there was a vexatious refusal to pay has been held to be a matter of fact to be determined by the trier of the facts, the verdict in this particular to be reached by a survey of all the facts and circumstances in the case. Upon the authority of Keller v. Home Life Ins. Co., 198 Mo. 440, l. c. 460, 95 S. W. 903; Kellogg v. German-American Ins. Co., 133 Mo. App. l. c. 403, 113 S. W. 663; and Brown v. Railway Passenger Assurance Co., 45 Mo. l. c. 227, we hold that the court committed no error in this regard.

Lastly, it is contended by appellant that as notice of the claim was not given and proofs of death were not furnished it within ninety days after the death of the assured there can be no recovery. This question, upon evidence to the same effect as that contained in the record before us in this case, we recently decided adversely to the contention of the appellant. (Mun v. New York Life Ins. Co., 181 S. W. 606.)

It results that the motion to transfer this cause to the Supreme Court of this State because of a constitutional question be-

127 ing involved must be overruled and the judgment of the trial court affirmed. Robertson, P. J. and Sturgis, J. concur.

JNO. S. FARRINGTON, *Judge.*

127*a* In the Springfield Court of Appeals, October Term, 1916, November 20th, 1916.

No. 1876.

LEO F. DODGE, Respondent,

v.

NEW YORK LIFE INSURANCE COMPANY, Appellant.

Appeal from the Circuit Court of Phelps County.

Now again come the parties aforesaid, by their respective attorneys, and the Court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said circuit court of Phelps county be in all things affirmed and stand in full force and effect, and that the said respondent recover of the said appellant costs and charges herein expended, and have execution therefor. Opinion filed.

STATE OF MISSOURI, *ss:*

I, George H. Daniel, Clerk of the Springfield Court of Appeals, certify that the above and foregoing is a full, true and complete copy of the judgment rendered in the above entitled cause, as fully as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Springfield, this 4th day of December, A. D. nineteen hundred and sixteen.

[Seal the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL, *Clerk.*

[Endorsed:] Springfield Court of Appeals. #1876. Leo F. Dodge, Resp. v. N. Y. Life Ins. Co., App. Mandate. Judgment of Circuit Court of Phelps county. Affirmed.

128 In the Supreme Court of Missouri, October Term, 1916.

In the Matter of NEW YORK LIFE INSURANCE COMPANY, ex Parte.

Petition for Writ of Mandamus.

To the Supreme Court of the State of Missouri and the Honorable Judges thereof:

Your petitioner, New York Life Insurance Company, respectfully states that it is and was at all the times involved in this controversy

a life insurance corporation duly organized under the laws of the State of New York and licensed to do business as a foreign life insurance corporation in the State of Missouri, and that Wil-
129 liam R. Robertson, John T. Sturgis and John S. Farrington are and were, on November 20, 1916, the duly qualified and acting Judges of the Springfield Court of Appeals of the State of Missouri.

That on the 27th day of January, 1915, one Leo F. Dodge instituted an action against your petitioner, New York Life Insurance Company, in the Circuit Court of Phelps County, Missouri, to recover the sum of eighteen hundred and forty-three dollars and seven cents ($1,843.07), under a policy of insurance issued by your petitioner, New York Life Insurance Company, on the life of one Josiah B. Dodge, on the 20th day of October, 1900, together with ten per cent (10%) interest thereon, as damages, and such further sums as might appear to be reasonable for her attorneys' fees, because of the alleged vexatious refusal of the defendant to pay said policy.

That the lapse of the policy sued on by the said Leo F. Dodge for the non-payment of the premium due thereunder on the 20th day of October, 1907, was admitted by both parties to said action, the said Leo F. Dodge contending that she was entitled to recover under Section 7897 of the Revised Statutes of Missouri for 1899, because three-fourths of the reserve on said policy, after deducting therefrom any notes or other evidence of indebtedness given on account of past premium payments, applied as a net single premium for the purchase of extended insurance, was sufficient to extend said policy, under the provisions of said statute, to a date beyond the insured's death.

That it was admitted by both parties to said action that at the time of the lapse of said policy there was an outstanding indebtedness or loan thereon of thirteen hundred and fifty dollars ($1,350.00).

130 It was conceded by both parties to said action that three-fourths of the revenue of said policy at the time of its lapse for non-payment of the premium due October 20, 1907, computed in accordance with Section 7897, Revised Statutes of Missouri for 1899, amounted to nine hundred and forty-two dollars and ninety-four cents ($942.94); that three-fourths of said reserve, as aforesaid, less only that part or portion of the indebtedness or loan of thirteen hundred and fifty dollars ($1,350.00) outstanding on said policy at the time of its lapse, which represented an evidence of indebtedness on account of past premium payments, was sufficient, when applied as a net single premium in accordance with the provisions of Section 7897, Revised Statutes of Missouri for 1899, to continue said policy from the date of its lapse to a date beyond the death of the insured, but that if the entire indebtedness outstanding on said policy was deducted from three-fourths of this reserve there would be nothing available for the purchase of extended insurance.

Your petitioner, in its answer to the petition of said Leo F. Dodge in said action, as aforesaid, expressly alleged that Section 7897, Revised Statutes of Missouri for 1899, was unconstitutional and void

because it was in violation of Article IV, Section 1, of the Constitution of the United States; Section 1 of the Fourteenth Amendment to the Constitution of the United States; Article IV, Section 2, of the Constitution of the United States; the Fifth Amendment to the Constitution of the United States, and Article I, Section 10, of the Constitution of the United States, for the reason that the requirements of said statute, as construed by the courts of Missouri, that upon the lapse of a policy of life insurance for the non-payment of any
131 premiums subsequent to the second there shall be deducted from the reserve, in arriving at the amount to be applied to the purchase of extended insurance, only such notes or other evidence of indebtedness given on account of past premium payments on said policy, denies to your petitioner the equal protection of the laws and deprives your petitioner of its liberty and property without due process of law.

That thereafter, on the 4th day of May, 1916, judgment was rendered in favor of plaintiff, Leo. F. Dodge, in said action, as aforesaid, and against your petitioner, for the sum of twenty-three hundred and thirty-four dollars ($2,334.00), which amount included the sum sued for by the plaintiff, Leo F. Dodge, under said policy, with interest, and the further sum of two hundred and fifty dollars ($250.00) as attorneys' fees; that within four days thereafter and during the same term of court your petitioner filed its motion for a new trial in said cause, and set up as one of the grounds therefor that Section 7897, Revised Statutes of Missouri for 1899, was unconstitutional and void and in violation of the provisions of the Federal Constitution as set forth in its answer as aforesaid, and also that Section 7068, Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri, page 282, amendment thereof, authorizing the imposition of damages and attorneys' fees is unconstitutional and void because in violation of Section 10 of Article I of the Constitution of the United States, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in violation of Section 30 of Article II and Section 10 of Article II of the Constitution of Missouri, and because the construction thereof by the courts of Missouri constitutes a rule of judicial con-
132 struction in violation of said provisions of said State and Federal Constitutions, and because said Section 7068, Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri 1911, page 282, in its application to the facts in said case of Leo F. Dodge against your petitioner, as aforesaid, denies to your petitioner due process of law as guaranteed to it by said Federal and State Constitutions.

Your petitioner further states that its motion for a new trial was overruled, and thereafter, during the same term of court, your petitioner filed the statutory affidavit and bond for appeal, and, an appeal having been refused your petitioner to the Supreme Court of Missouri, the same was allowed and taken to the Springfield Court of Appeals; that while said cause was pending in the Springfield Court of Appeals and before the submission thereof your petitioner filed in said Springfield Court of Appeals a motion to transfer said

cause to the Supreme Court of Missouri on the ground that said cause involved the constitutionality of statutes of the State of Missouri, to-wit, Section 7897, R. S. Mo. 1899, and Section 7068, R. S. Mo. 1909, and the Act of March 30, 1911, Laws of Missouri for 1911, page 282, an amendment thereof, and that the Supreme Court of Missouri, under the Constitution and statutes of this State, had sole and exclusive jurisdiction of this cause; that thereafter said cause came on for hearing in the Springfield Court of Appeals and, said cause having been argued and submitted, that court, on the 20th day of November, 1916, overruled the motion of your petitioner to transfer said cause to this court and affirmed the judgment of the trial court, as appears from the copy of the opinion of the
133 Springfield Court of Appeals in said cause which is hereto attached as exhibit "A."

Your petitioner further shows to this Court that the Springfield Court of Appeals has entertained jurisdiction in said cause of Leo F. Dodge against your petitioner without warrant of law and has affirmed the judgment of the trial court in favor of said Leo F. Dodge and against your petitioner, when the said Springfield Court of Appeals had no jurisdiction of said cause, as shown by said opinion, Exhibit "A" hereto.

Wherefore, your petitioner prays this Court to grant unto your petitioner a writ of mandamus which shall order and direct the said William R. Robertson, John T. Sturgis and John S. Farrington, as Judges of the Springfield Court of Appeals, that they do proceed no further in the execution of their said judgment upon the appeal of your petitioner in the cause aforesaid of Leo F. Dodge against your petitioner, and that they, the aforesaid, as Judges of said Springfield Court of Appeals, do certify to this Court said appeal in said cause and the record and proceedings of the Circuit Court in said cause as filed in and certified to said Springfield Court of Appeals for the hearing of the appeal of your petitioner therein, or that they be and appear in this Honorable Court at a date to be by the Court fixed and determined to show cause, if any they can, why they should not be peremptorily ordered and directed by this Court to so certify said appeal and the record and proceedings thereof to this Court for hearing and determination, in accordance with the jurisdiction of said appeal as vested in this Court by the Constitution of this State; and that the Court will enter
134–144*b* such other and further orders and directions as to the Court may seem meet and proper in the premises and as right and justice here require.

NEW YORK LIFE INSURANCE COMPANY, *Petitioner,*
By JONES, HOCKER, SULLIVAN & ANGERT,
JAMES C. JONES, *Its Agents and Attorneys.*

James C. Jones, attorney and agent for New York Life Insurance Company, makes oath and says the facts stated in the above petition are true.

JAMES C. JONES.

Subscribed and sworn to before me this 28 day of November, 1916.
[SEAL.] EDWARD W. LAKE,
Notary Public.

* * * * * * *

145 In the Supreme Court of Missouri, October Term, 1916.

STATE OF MISSOURI ex Rel., NEW YORK LIFE INSURANCE COMPANY, Relator,

vs.

WM. R. ROBERTSON, JOHN T. STURGIS, and JOHN S. FARRINGTON, Judges of the Springfield Court of Appeals, Respondents.

Now at this day, the Court having fully considered and understood the petition for a writ of mandamus filed herein by the said relator, doth order and adjudge that said writ be denied, and that the said respondents recover against the said relator their costs and charges herein expended and have execution therefor.

STATE OF MISSOURI, *sct*:

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the October Term thereof, 1916, and on the 21st day of December, 1916, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of January, 1917.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN, *Clerk.*
—— ——, *D. C.*

146 In the Springfield Court of Appeals, State of Missouri.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,

vs.

LEO F. DODGE, Defendant in Error.

Assignment of Errors.

The plaintiff in error, New York Life Insurance Company, complains of Leo F. Dodge and says there is manifest error in the record in the above cause and in the decision and judgment of the Springfield Court of Appeals of the State of Missouri, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment of errors:

1. The Supreme Court of Missouri having previously construed Section 7897, Revised Statutes of Missouri, 1899, as invalidating the pledge by the insured to the insurer of the reserve of a life insurance policy to secure the indebtedness of the insured (other than for past premiums on the policy), while recognizing the
147 validity of such a pledge to any other person than the insurer, the Springfield Court of Appeals erred in not holding and deciding that said statute as so construed was invalid and that the said statute as so construed by the Supreme Court of Missouri denied to the plaintiff in error the right, privilege and immunity claimed by it under the 14th amendment to the Constitution of the United States, because the said statute as so construed recognizes the validity of a pledge however made to any other person, while it denies the validity of such a pledge made to the insurer unless the indebtedness secured by such pledge arises from past premium payments on the policy.

2. By the judgment and decision of the Springfield Court of Appeals in this case, the said Court construes and applies Section 7897, Revised Statutes of Missouri, 1899, as invalidating the pledge by the insured to the insurer of the reserve of the policy to secure an indebtedness of the insured (other than for past premiums on the policy), while recognizing the validity of such a pledge to any other person than the insurer, and the said Springfield Court of Appeals erred in not further holding that said statute so construed and to that extent was violative of the 14th Amendment to the Constitution of the United States and denied the plaintiff in error the right, privilege and immunity claimed by it under the 14th Amendment to the Constitution of the United States.

3. Section 7897, Revised Statutes of Missouri, 1899, as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it denies to the plaintiff in
148 error the equal protection of the law guaranteed to it by the 14th Amendment to the Constitution of the United States.

4. Section 7897, Revised Statutes of Missouri, 1899, as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it deprives the plaintiff in error of its liberty without due process of law as guaranteed to it by the 14th Amendment to the Constitution of the United States.

5. Section 7897, Revised Statutes of Missouri, 1899, as construed by the Springfield Court of Appeals in this case is unconstitutional and void, because it deprives the plaintiff in error of its property without due process of law as guaranteed to it by the 14th Amendment to the Constitution of the United States.

6. The Springfield Court of Appeals, by its judgment in this cause, denied to the plaintiff in error a right and immunity specially set up and claimed by it under the Federal Constitution and the 14th Amendment thereto, to-wit: the right, privilege and immunity to contract for, take and hold in pledge a policy and its reserve thereon to secure an indebtedness due to it by the insured, on the same conditions and under the same circumstances that any other person might contract for, take and hold such pledge; and in so do-

ing construing and applying Section 7897, Revised Statutes of Missouri, 1899, in a manner violative of the 14th Amendment to the Constitution of the United States.

7. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as
149 interpreted and applied in this case was valid and not repugnant to the 14th Amendment to the Constitution of the United States.

8. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case, was not violative of the 14th Amendment to the Constitution of the United States.

9. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case, did not abridge the privileges and immunities of citizens or of the plaintiff in error as guaranteed by the 14th Amendment to the Federal Constitution.

10. The Springfield Court of Appeals denied the plaintiff in error a right and immunity claimed by it under the Constitution of the United States in refusing to consider and in terms refusing to pass upon the validity, under the Constitution of the United States, of Section 7897, Revised Statutes of Missouri, 1899, and, at the same time, by its judgment, upholding and enforcing said section of said statutes, and thereby, in essence and effect, deciding that said statute was valid and not violative of the Constitution of the United States.

11. The Springfield Court of Appeals denied the plaintiff in error a right and immunity claimed by it under the Constitution of the United States in this, that said court, by the local law and statutes of the State of Missouri, is without jurisdiction to pass upon and consider questions arising under or involving the Constitution of the United States, and, under the local law of said State of Mis-
150 souri governing such court, cases involving questions arising under the Constitution of the United States are required to be transferred by said court to the Supreme Court of the State of Missouri and to be there determined; yet, although the plaintiff in error specially set up and claimed a right and immunity under the Constitution of the United States (to-wit, the right and immunity to have the contract of pledge between the insurer and insured construed according to its terms and unaffected and uncontrolled by Section 7897, Revised Statutes of Missouri, 1899, because said statute as construed and applied in this case is violative of the 14th Amendment to the Constitution of the United States), the said Springfield Court of Appeals refused, although formally requested so to do by plaintiff in error, to transfer this cause to the Supreme Court of the State of Missouri, by which said right so claimed by the plaintiff in error could be determined by the court having jurisdiction according to the local law governing the courts of the State of Missouri to hear and determine such a question, and, on the contrary, the said Springfield Court of Appeals retained this cause and proceeded herein to final judgment, and, by its judgment, construed and so enforced said statute, that the necessary effect of which judgment is to deny to the

plaintiff in error the right, privilege and immunity under the Federal Constitution so claimed by it.

12. The judgment of the Springfield Court of Appeals of Missouri deprives the plaintiff in error of its property without due process of law, contrary to Section 1 of the 14th Amendment to the Constitution of the United States, for the reason that the
151 statute of the State of Missouri, Section 7068 of the Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof and the construction thereof by the court in this case and by the course of judicial construction thereof by the courts of Missouri, authorizing the imposition of damages and attorneys' fees, permit and authorize the taking of property by pretended process of law, which is not actual process of law in that it permits the taking of private property without notice, plea, proof or an opportunity to be heard and to have a judicial inquiry before the property is adjudged to be taken, and because the condition on which said statute and the Act of March 30, 1911, in amendment thereof, say the property may be taken, i. e., "vexatious delay," is not required to be pleaded or proven.

13. The Springfield Court of Appeals of Missouri erred in affirming the judgment of the trial court, which included an allowance to plaintiff by way of attorneys' fees, because Section 7068, Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof, which authorize the imposition by the court or jury of attorneys' fees against insurance companies for their vexatious refusal to pay the amount of policies of insurance issued by them, as construed by the Courts of Missouri, and in its application by the Springfield Court of Appeals of Missouri to the facts in this case, deprive the plaintiff in error of its property without due process of law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States, for the reason that there is no evidence in this
152 case that the refusal final judgment, and, by its judgment, construed and so enforced said statute, that the necessary effect of which judgment is to deny to the plaintiff in error the right, privilege and immunity under the Federal Constitution so claimed by it.

12. The judgment of the Springfield Court of Appeals of Missouri deprives the plaintiff in error of its property without due process of law, contrary to Section 1 of the 14th Amendment to the Constitution of the United States, for the reason that the statute of the State of Missouri, Section 7068 of the Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof and the construction thereof by the court in this case and by the court of judicial construction thereof by the courts of Missouri, authorizing the imposition of damages and attorneys' fees, permits and authorizes the taking of property by pretended process of law, which is not actual process of law in that it permits the taking of private property without notice, plea, proof or an opportunity to be heard and to have a judicial inquiry before the property is adjudged to be taken, and because the condition on

which said statute and the Act of March 30, 1911, in amendment thereof, says the property may be taken, i. e., "vexatious delay," is not required to be pleaded or proven.

13. The Springfield Court of Appeals of Missouri erred in affirming the judgment of the trial court, which included an allowance to plaintiff by way of attorneys' fees, because Section 7068, Re-
153 vised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof, which authorizes the imposition by the court or jury of attorneys' fees against insurance companies for their vexatious refusal to pay the amount of policies of insurance issued by them, as construed by the courts of Missouri, and in its application by the Springfield Court of Appeals of Missouri to the facts in this case, deprives the plaintiff in error of its property without due process of law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States, for the reason that there is no evidence in this case that the refusal of the plaintiff in error to pay to the defendant in error the amount of the policy in suit was vexatious.

Your petitioner further shows to the court, as will appear by reference to the record and proceedings in this cause, that in its answer filed in this cause it expressly attacked the constitutionality of Section 7897 of the Revised Statutes of Missouri for 1899 and Section 7068 of the Revised Statutes of Missouri for 1909 and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof, as being contrary to and in violation of the provisions of the Constitution of the United States as hereinbefore set forth, and in its motion for a new trial in the trial court your petitioner asserted the unconstitutionality of said statutes as being contrary to and in violation of said provisions of the Constitution of the United States, and that in its assignment of errors in the Springfield Court of Appeals of Missouri it expressly assigned the following errors:

154 "1. The Court below erred in refusing to hold and declare as a matter of law that Section 7897, R. S. Mo., 1899, is contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, Section 10, Article I, of the Constitution of the United States, Section 1, Article IV, of the Constitution of the United States and the Fifth Amendment to the Constitution of the United States, and is, therefore, unconstitutional and void.

"2. The Court below erred in refusing to hold and declare as a matter of law that Section 7068, R. S. Mo., 1909, and the act of March 30, 1911 (Laws of Missouri, 1911, page 282), in amendment thereof, authorizing the imposition of damages and attorney's fees, are unconstitutional and void because in violation of Section 10 of Article I of the Constitution of the United States and of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 10 of Article II and Section 30 of Article II of the Constitution of Missouri, and because the construction thereof by the courts of Missouri constitutes a rule of judicial construction

violative of said provisions of said State and Federal Constitutions and because said statute, in its application to the facts in this case, denies the defendant due process of law and deprives it of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

"3. The Court below erred in refusing to hold and declare as a matter of law that before the plaintiff is entitled to recover under the provisions of Section 7897, R. S. Mo., 1899, notice of claim and proofs of the death of the insured must have been submitted to the defendant Company within ninety days after the insured's death as required by Section 7899, R. S. Mo., 1899."

Your petitioner further shows to the court that by reason of the aforesaid matters and things a right, privilege and immunity was claimed by your petitioner under the Constitution of the United States and was set up and brought into question and the decision was against the right, title and privilege so set up by your petitioner.

Considering itself aggrieved by the final decision of the Springfield Court of Appeals of Missouri in rendering judgment against it in the above entitled cause, your petitioner prays a writ of
155 error from said decision and judgment to the Supreme Court of the United States and an order fixing the amount of a supersedeas bond, and your petitioner will forever pray.

JAMES C. JONES,
Attorney for Petitioner, New York Life Insurance Co.

STATE OF MISSOURI:

Springfield Court of Appeals.

Let the writ of error issue upon the execution of a bond by the New York Life Insurance Company in the sum of Five Thousand Dollars ($5,000.00), such bond, when approved, to act as a supersedeas.

WILLIAM R. ROBERTSON,
Presiding Justice of the Springfield Court of Appeals.

[Endorsed:] Filed Dec. 30, '16. George H. Daniel, Clerk.

156 In the Springfield Court of Appeals, State of Missouri.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,

vs.

LEO F. DODGE, Defendant in Error.

Petition for Allowance of Writ of Error.

Now comes your petitioner, New York Life Insurance Company, by its attorney, James C. Jones, and respectfully shows that on the

20th day of November, 1916, the Springfield Court of Appeals of Missouri, being the highest court of the State of Missouri in which a decision could be had, rendered a judgment against your petitioner for the sum of Two Thousand, Three Hundred and Thirty-Four Dollars ($2,334.00) as will appear by reference to the record and proceedings in said cause.

Your petitioner respectfully claims the right to remove said record and judgment to the Supreme Court of the United States by writ of error under the statutes of the United States, authorizing writs of error to State courts, and particularly under Section 1214, United States Compiled Statutes for 1916, because in the record and pro-
157 ceedings had in said cause, and in the rendition of said judgment, manifest error hath happened to the great injury and damage of your petitioner in that:

1. The Supreme Court of Missouri having previously construed Section 7897, Revised Statutes of Missouri, 1899, as invalidating the pledge by the insured to the insurer of the reserve of a life insurance policy to secure the indebtedness of the insured (other than for past premiums on the policy), while recognizing the validity of such a pledge to any other person than the insurer, the Springfield Court of Appeals erred in not holding and deciding that said statute as so construed was invalid and that the said statute as so construed by the Supreme Court of Missouri denied to the plaintiff in error the right, privilege and immunity claimed by it under the 14th Amendment to the Constitution of the United States, because the said statute as so construed recognizes the validity of a pledge however made to any other person, while it denies the validity of such a pledge made to the insurer unless the indebtedness secured by such pledge arises from past premium payments on the policy.

2. By the judgment and decision of the Springfield Court of Appeals in this case, the said Court construes and applies Section 7897, Revised Statutes of Missouri, 1899, as invalidating the pledge by the insured to the insurer of the reserve of the policy to secure an indebtedness of the insured (other than for past premiums on the policy), while recognizing the validity of such a pledge to any other person than the insurer, and the said Springfield Court of Ap-
158 peals erred in not further holding that said statute so construed and to that extent was violative of the 14th Amendment to the Constitution of the United States and denied the plaintiff in error the right, privilege and immunity claimed by it under the 14th Amendment to the Constitution of the United States.

3. Section 7897, Revised Statutes of Missouri, 1899, as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it denies to the plaintiff in error the equal protection of the law guaranteed to it by the 14th Amendment to the Constitution of the United States.

4. Section 7897, Revised Statutes of Missouri, 1899, as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it deprives the plaintiff in error of its liberty without due process of law as guaranteed to it by the 14th Amendment to the Constitution of the United States.

5. Section 7897, Revised Statutes of Missouri, 1899, as construed by the Springfield Court of Appeals in this case is unconstitutional and void, because it deprives the plaintiff in error of its property without due process of law as guaranteed to it by the 14th Amendment to the Constitution of the United States.

6. The Springfield Court of Appeals, by its judgment in this cause, denied to the plaintiff in error a right and immunity specially set up and claimed by it under the Federal Constitution and the 14th Amendment thereto, to-wit: the right, privilege and immunity to contract for, take and hold in pledge a policy and its reserve
159 thereon to secure an indebtedness due to it by the insured, on the same conditions and under the same circumstances that any other person might contract for, take and hold such pledge; and in so doing construing and applying Section 7897, Revised Statutes of Missouri, 1899, in a manner violative of the 14th Amendment to the Constitution of the United States.

7. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as interpreted and applied in this case was valid and not repugnant to the 14th Amendment to the Constitution of the United States.

8. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case, was not violative of the 14th Amendment to the Constitution of the United States.

9. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case, did not abridge the privileges and immunities of citizens or of the plaintiff in error as guaranteed by the 14th Amendment to the Federal Constitution.

10. The Springfield Court of Appeals denied the plaintiff in error a right and immunity claimed by it under the Constitution of the United States in refusing to consider and in terms refusing to pass upon the validity, under the Constitution of the United States, of Section 7897, Revised Statutes of Missouri, 1899, and, at the same time, by its judgment, upholding and enforcing said section of said statutes, and thereby, in essence and effect, deciding that said
160 statute was valid and not violative of the Constitution of the United States.

11. The Springfield Court of Appeals denied the plaintiff in error a right and immunity claimed by it under the Constitution of the United States in this, that said court, by the local law and statutes of the State of Missouri, is without jurisdiction to pass upon and consider questions arising under or involving the Constitution of the United States, and, under the local law of said State of Missouri governing such court, cases involving questions arising under the Constitution of the United States are required to be transferred by said court to the Supreme Court of the State of Missouri and to be there determined; yet, although the plaintiff in error specially set up and claimed a right and immunity under the Constitution of the United States (to-wit, the right and immunity to have the contract of pledge between the insurer and insured construed according to

its terms and unaffected and uncontrolled by Section 7897, Revised Statutes of Missouri, 1899, because the said statute as construed and applied in this case is violative of the 14th Amendment to the Constitution of the United States), the said Springfield Court of Appeals refused, although formally requested so to do by plaintiff in error, to transfer this cause to the Supreme Court of the State of Missouri, by which said right so claimed by the plaintiff in error could be determined by the court having jurisdiction according to the local law governing the courts of the State of Missouri to hear and determine such a question, and, on the contrary, the said Springfield Court of Appeals retained this cause and proceeded herein to——

161 ——of the plaintiff in error to pay to the defendant in error the amount of the policy in suit was vexatious.

For all of which reasons the plaintiff in error prays that said judgment may be in all things reversed, set aside and held for naught, and that this court direct a judgment in favor of the defendant to the court below.

NEW YORK LIFE INSURANCE COMPANY,
By JAMES C. JONES, *Its Attorney.*

[Endorsed:] Filed Dec. 30, '16. George H. Daniel, Clerk.

162 Copy.

In the Springfield Court of Appeals.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,

v.

LEO F. DODGE, Defendant in Error.

Bond.

Know all men by these presents, That we, New York Life Insurance Company, as principal, and The Fidelity and Casualty Company of New York, as surety, are held and firmly bound unto Leo F. Dodge, in the sum of Five Thousand Dollars ($5,000.00) to be paid to the said Leo F. Dodge, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of December, 1916.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the State of Missouri:

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be ad-

judged if it shall fail to make good its plea, then this obliga-
163 tion shall be void, otherwise to remain in full force and effect.

NEW YORK LIFE INSURANCE COMPANY,
By JAMES C. JONES, *Its Attorney & Agent.*

Bond approved and to operate as a supersedeas.
Dated Dec. 29th, 1916.

W. R. ROBERTSON,
Presiding Justice Springfield Court of Appeals, State of Missouri.

[Endorsed:] Filed Dec. 30, '16. George H. Daniel, Clerk.

164 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Springfield Court of Appeals, State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Leo F. Dodge and New York Life Insurance Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said New York Life Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be
duly corrected, and full and speedy justice done to the parties
165 aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 30 day of December, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of the United States District Court, Southern Division, of the Western Judicial District of Missouri.]

JOHN B. WARNER,
Clerk District Court United States for Western Judicial District of Missouri.
By GEORGE PEPPERDINE, *Deputy.*

[Endorsed:] Filed Dec. 30, '16. George H. Daniel, Clerk.

166 No. —.

Certificate of Lodgment.

STATE OF MISSOURI, *ss:*

I George H. Daniel, Clerk of the Springfield Court of Appeals, do hereby certify that there was lodged with me, as such clerk, on the 30th day of December, 1916, in the matter of Leo F. Dodge, Defendant in Error, vs. New York Life Insurance Company, Plaintiff in Error,

1. The Writ of Error as herein set forth and a copy thereof, for the defendant in error, Leo F. Dodge, the original, which is herein set forth.

2. The original bond, a copy of which is herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at my office in the city of Springfield, State aforesaid, this 15th day of January, 1917.

[Seal the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL,
Clerk Springfield Court of Appeals.

167 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Leo F. Dodge, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Springfield Court of Appeals, State of Missouri, wherein the New York Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff

in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Presiding Justice of the Springfield Court of Appeals, State of Missouri, this 29th day of December, 1916.

WILLIAM R. ROBERTSON,
Presiding Justice Springfield Court of Appeals, State of Missouri.

Attest:

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL,
Clerk Springfield Court of Appeals, State of Missouri.

St. Louis, Mo., Dec. 30th, 1916.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

LORTS & BREUER &
JAMES J. O'DONOHOE,
Attorney- for Leo F. Dodge.

[Endorsed:] Filed Dec. 30, '16. George H. Daniel, Clerk.

168 In the Springfield Court of Appeals.

LEO F. DODGE, Respondent (Defendant in Error),

v.

NEW YORK LIFE INSURANCE COMPANY, Appellant (Plaintiff in Error).

STATE OF MISSOURI, *ss:*

I, George H. Daniel, Clerk of the Springfield Court of Appeals certify that the foregoing is a full, true and complete transcript of all records and proceedings, in the above entitled cause, as called for by the præcipe filed herein, and made a part hereof, as fully as the same appear of record or on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Springfield Court of Appeals, at my office in the City of Springfield, State aforesaid, this 15th day of January 1917.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL,
Clerk of Springfield Court of Appeals.

169 *Return to Writ.*

STATE OF MISSOURI, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record, and proceedings in the within entitled cause, together with all things concerning the same.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Springfield Court of Missouri, this 15th day of January 1917.

[Seal of the Springfield Court of Appeals, Missouri.]

GEORGE H. DANIEL,
Clerk of Springfield Court of Appeals.

170 In the Supreme Court of the United States.

NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error,

v.

LEO F. DODGE, Defendant in Error.

Statement of Points Relied upon by Plaintiff in Error and of Parts of Record Necessary for the Consideration Thereof.

To the Clerk of the Supreme Court of the United States:

Please take notice that the plaintiff in error, New York Life Insurance Company, expects to rely for a reversal upon the following points:

1. Section 7897, Revised Statutes of Missouri for 1899 is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that said Section invalidates and renders unenforceable a pledge by the insured to the insurer of the reserve of a life insurance policy to secure a loan or indebtedness where such loan or indebtedness is not for past premiums on the policy, although said statute recognizes and enforces the validity of a pledge by the insured of such
171 reserve to any other person for any indebtedness, however contracted.

2. By the judgment and decision of the Springfield Court of Appeals in this case, the said Court construes and applies Section 7897, Revised Statutes of Missouri, 1899, as invalidating the pledge by the insured to the insurer of the reserve of the policy to secure an indebtedness of the insured (other than for past premiums on the policy), while recognizing the validity of such a pledge to any other person than the insurer, and the said Springfield Court of Appeals erred in not further holding that said statute so construed and to

that extent was violative of the Fourteenth Amendment to the Constitution of the United States and denied the plaintiff in error the right, privilege and immunity claimed by it under the Fourteenth Amendment to the Constitution of the United States.

3. Section 7897, Revised Statutes of Missouri, 1899, as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it denies to the plaintiff in error the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

4. Section 7897, Revised Statutes of Missouri, 1899, as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it deprives the plaintiff in error of its liberty without due process of law as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

5. Section 7897, Revised Statutes of Missouri, 1899, as construed by the Springfield Court of Appeals in this case is uncon-
172 stitutional and void, because it deprives the plaintiff in error of its property without due process of law as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

6. The Springfield Court of Appeals, by its judgment in this cause, denied to the plaintiff in error a right and immunity specially set up and claimed by it under the Federal Constitution and the Fourteenth Amendment thereto, to-wit: the right, privilege and immunity to contract for, take and hold in pledge a policy and its reserve thereon to secure an indebtedness due to it by the insured, on the same conditions and under the same circumstances that any other person might contract for, take and hold such pledge; and in so doing construing and applying Section 7897, Revised Statutes of Missouri, 1899, in a manner violative of the Fourteenth Amendment to the Constitution of the United States.

7. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as interpreted and applied in this case was valid and not repugnant to the Fourteenth Amendment to the Constitution of the United States.

8. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case, was not violative of the Fourteenth Amendment to the Constitution of the United States.

9. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case, did not abridge the privileges and immunities of citizens or of the plaintiff in error as guaranteed
173 by the Fourteenth Amendment to the Federal Constitution.

10. The Springfield Court of Appeals denied the plaintiff in error a right and immunity claimed by it under the Constitution of the United States in refusing to consider and in terms refusing to pass upon the validity, under the Constitution of the United States, of Section 7897, Revised Statutes of Missouri, 1899, and, at the same time, by its judgment, upholding and enforcing said section of said statutes, and thereby, in essence and effect, deciding that said

statute was valid and not violative of the Constitution of the United States.

11. The Springfield Court of Appeals denied the plaintiff in error a right and immunity claimed by it under the Constitution of the United States in this, that said court, by the local law and statutes of the State of Missouri, is without jurisdiction to pass upon and consider questions arising under or involving the Constitution of the United States, and, under the local law of said State of Missouri governing such court, cases involving questions arising under the Constitution of the United States are required to be transferred by said Court to the Supreme Court of the State of Missouri and to be there determined; yet, although the plaintiff in error specially set up and claimed a right and immunity under the Constitution of the United States (to-wit, the right and immunity to have the contract of pledge between the insurer and the insured construed according to its terms and unaffected and uncontrolled by Section 7897, Revised Statutes of Missouri, 1899, because said statute as construed and applied in this case is violative of the Fourteenth Amendment to the Constitution of the United States), the said Springfield
174 Court of Appeals refused, although formally requested so to do by plaintiff in error, to transfer this cause to the Supreme Court of the State of Missouri, by which said right so claimed by the plaintiff in error could be determined by the Court having jurisdiction, according to the local law governing the Courts of the State of Missouri, to hear and determine such a question, and, on the contrary, the said Springfield Court of Appeals retained this cause and proceeded herein to final judgment, and, by its judgment, construed and so enforced said statute that the necessary effect of which judgment is to deny to the plaintiff in error the right, privilege and immunity under the Federal Constitution so claimed by it.

12. The judgment of the Springfield Court of Appeals of Missouri deprives the plaintiff in error of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the statute of the State of Missouri, Section 7068 of the Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof, and the construction thereof by the Court in this case and by the course of judicial construction thereof by the Courts of Missouri, authorizing the imposition of damages and attorneys' fees, permit and authorize the taking of property by pretended process of law, which is not actual process of law in that it permits the taking of private property without notice, plea, proof or an opportunity to be heard and to have a judicial inquiry before the property is adjudged to be taken, and because the condition on which said statute and the Act of March 30,
175 1911, in amendment thereof, say the property may be taken, i. e., "vexatious delay," is not required to be pleaded or proven.

13. The Springfield Court of Appeals of Missouri erred in affirming the judgment of the trial court, which included an allowance to plaintiff by way of attorneys' fees, because Section 7068, Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws

of Missouri, 1911, page 282, in amendment thereof, which authorize the imposition by the court or jury of attorneys' fees against insurance companies for their vexatious refusal to pay the amount of policies of insurance issued by them, as construed by the Courts of Missouri, and in its application by the Springfield Court of Appeals of Missouri to the facts in this case, deprive the plaintiff in error of its property without due process of law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that there is no evidence in this case that the refusal of the plaintiff in error to pay to the defendant in error the amount of the policy in suit was vexatious.

For the proper consideration of the foregoing points, plaintiff in error deems the entire record necessary, except the following portions, which the Clerk will omit:

1. The petition of Leo F. Dodge (Transcript pp. 7-11) and insert in lieu thereof the amended petition of Leo F. Dodge found on pp. 111-117 of the transcript.

2. The index to the record in Springfield Court of Appeals (Transcript pp. 107-109 inclusive).

3. All of page 110 and the first three lines of page 111 of the transcript.

176 4. Pages 135-144*b* of the transcript, the parts to be omitted being Exhibit A to the petition for mandamus and suggestions in support thereof.

JAMES C. JONES,
FRANK H. SULLIVAN,
Attorneys for Plaintiff in Error.

Service of the foregoing is hereby acknowledged this 29 day of January, 1917.

LORTS & BREUER AND
JAMES J. O'DONOHOE,
Attorneys for Defendant in Error.

177 [Endorsed:] 898/25728. In the Supreme Court of the United States. New York Life Insurance Company, Plaintiff in Error, v. Leo F. Dodge, Defendant in Error. Statement of points relied upon by Plaintiff in Error and of parts of record necessary for the consideration thereof. Jones, Hocker, Sullivan & Angert, Attorneys at Law, Third National Bank Building, Saint Louis.

178 [Endorsed:] File No. 25,728. Supreme Court U. S., October term, 1916. Term No. 898. New York Life Insurance Company, Pl'ff in Error, vs. Leo F. Dodge. Statement of errors relied upon and designation by plaintiff in error of parts of record to be printed.

Filed January 31, 1917.

Endorsed on cover: File No. 25,728, Missouri Springfield Court of Appeals. Term No. 378. New York Life Insurance Company, Plaintiff in Error vs. Leo F. Dodge. Filed January 24th 1917. File No. 25,728.

Office Supreme Court, U. S.
FILED
NOV 3 1917
JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 378

NEW YORK LIFE INSURANCE COMPANY
Plaintiff in Error

vs.

LEO F. DODGE,
Defendant in Error

BRIEF FOR PLAINTIFF IN ERROR.

JAMES C. JONES AND
JAMES H. McINTOSH,
Attorneys for Plaintiff in Error

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Supreme Court of the United States

OCTOBER TERM, 1917.

No. 378.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff-in-Error,
against
LEO F. DODGE.

Brief for Plaintiff-in-Error.

BRIEF STATEMENT OF THE ISSUE.

MAY IT PLEASE THE COURT,—

This is a Writ of Error to the highest court of Missouri having jurisdiction of the case, to review, on constitutional grounds, a judgment in favor of the plaintiff on a lapsed life insurance policy pledged in New York as security for a loan, the pledge foreclosed, and the indebtedness satisfied out of the reserve on the policy, which exhausted its entire value. There never has been any disputed fact in the case.

October 20, 1900, Josiah B. Dodge, of Missouri, took out a policy insuring his life for $5,000, in which he named the plaintiff as beneficiary. November 9, 1906, at the Company's office in New York, he and the plaintiff borrowed from the defendant $1,350 on the pledge of the policy as collateral security. The policy lapsed for the non-payment of the October 20, 1907 premium, and thereupon the indebtedness became due and the Company fore-

closed the pledge by satisfying the indebtedness out of the reserve held by it on the policy, as the parties had agreed it should do in such case, which exhausted the entire reserve, and December 17, 1907, notified the insured thereof and told him the policy had no further value, which was true.

No one claims this was not all done in strict compliance with the contract of loan and pledge, and in equally strict compliance with the laws of New York, where it was done.

The insured and the plaintiff both seemed to be entirely satisfied with the transaction, because they never objected to it, never thereafter offered to pay any premium or loan interest, nor did anything about it,—although the insured lived until February 12, 1912. No one ever questioned the transaction until, more than two years after the insured's death and in 1914, the plaintiff's lawyer wrote to the Company claiming that the insured and the beneficiary could not dispose of their policy in the way they had done because the non-forfeiture provisions of the Revised Statutes of Missouri, 1899, Section 7897, provided as follows:

> "No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A. D., 1879, shall, after payment upon it of three annual payments, be forfeited or become void by reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the Actuaries' or Combined experienced table of mortality, with four per cent interest per annum, and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the Company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then cancelled, the balance shall be taken as a net single premium for tem-

> porary insurance for the full amount written in the policy: and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid;"

Therefore, plaintiff's lawyer claimed that under this statute, as construed by the Missouri courts, the insured and the beneficiary could not rid themselves of the continued insurance which the reserve named in the statute, less any indebtedness on account of past due premiums, would purchase, no matter whether they had previously borrowed the reserve from the Company, or had undertaken to surrender, and had surrendered, their policy to it for its full value, or not.

Hence the beneficiary sued the Company, and the Missouri court sustained her above claim and rendered judgment on the policy accordingly.

The defendant claims that the judgment is erroneous and the Statute of Missouri upon which the judgment is based as construed and applied by the Missouri Courts in this case is unconstitutional, because,—

First.—They deprive the parties to the several contracts in question of their liberty of contract without due process of law, contrary to and in violation of Section 1, Article XIV, of the Amendments to the Constitution of the United States.

Second.—They deprive the defendant of its property without due process of law, contrary to and in violation of Section 1, Article XIV, of the Amendments to the Constitution of the United States.

Third.—They deny the defendant the equal protection of the law, contrary to and in violation of Section 1, Article XIV, of the Amendments to the Constitution of the United States.

The validity of this statute as so construed and applied, the defendant drew in question in its answer, on the ground of its being repugnant to the Constitution of the United States for the several reasons aforesaid (p. 7), and upon the same ground it has urged the invalidity of said statute and of said judgment based thereon throughout the whole course of this litigation; but the decision of every court of the state, including the highest court of Missouri in which a decision in the suit could be had, was in favor of the validity of said statute as so construed and of said judgment.

STATEMENT OF THE CASE.

I.

The parties to the contract.

The plaintiff and her husband, Josiah B. Dodge, were (p. 63) residents and citizens of the State of Missouri, and the defendant (p. 70) a resident and citizen of the United States and of the State of New York, to wit, a corporation organized and existing under and by virtue of the laws of New York for the purpose of transacting the business of life insurance, having its principal office and place of business in the City of New York, in the State of New York, and at all the times herein mentioned was duly authorized (p. 63) to transact the business of life insurance in Missouri, having a premium collection and forwarding office in the City of St. Louis.

II.

How the insurance contract was made

August 23, 1900, at St. Louis (p. 19), Josiah B. Dodge signed his written application to the defendant (p. 17), for $5,000 insurance on his life, and therein agreed (p. 18),—

> "That inasmuch as only the officers at the Home Office of the company in the City of New York have authority to determine whether or not a policy shall issue on any application, no statements, * * * shall be binding on the company * * * unless * * * reduced to writing, and presented to the officers of the company at the Home Office, in this application. * * * That the policy applied for shall be in the form now in use by the company, and that the contract contained in such policy and in this application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the Home Office of the company."

The Company duly accepted the application and (p. 53) issued the policy on "the defendant's regular form adopted in 1899 for twenty-year endowment policies," and delivered it to the applicant (p. 21) October 20, 1900, who there and then signed and sent to the defendant a communication as follows (p. 20),—

> "To the New York Life Insurance Company, 346 & 348 Broadway, New York:
>
> I hereby accept policy No. 2,054,961, * * *.
>
> I hereby present this acceptance as an amendment to my application dated the 23rd day of August, 1900, and agree that it shall form a part of said application, the agreements in which I hereby renew and confirm.
>
> J. B. DODGE.
>
> Dated at St. Louis, Oct. 20th, 1900.
>
> Witness:
>
> G. W. HALL.

Stamped on face: Received Oct. 29, 1900. Home Office.
Stamped on back: Received Nov. 1, 1900. File Clerk."

The plaintiff says (p. 14) the application was made, the policy delivered, and all premiums paid in St. Louis.

III.

The terms of the policy.

By the terms of the policy (p. 21) the (p. 24) premiums were due and payable at the Home Office. Also the insurance was payable (p. 21) "at the Home Office of the company in the City of New York." The insured could change the beneficiary "by written notice to the company at its Home Office, accompanied by this policy," and in the event of lapse the policy could be reinstated by (p. 24) written application to the Home Office with evidence of insurability satisfactory to the company (p. 25). "Any assignment of this policy must be made in duplicate and both sent to the Home Office."

The policy provided for loans as follows (p. 22),—

> "Cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years, if premiums have been duly paid to the anniversary of the insurance next succeeding the date when the loan is made. *Application for any loan must be made in writing to the Home Office of the Company, and the loan will be subject to the terms of the Company's loan agreement.* The amount of loan available at any time is stated below, and includes any previous loan then unpaid. Interest will be at the rate of five per cent per annum in advance."

IV.

The insured and the plaintiff borrowed from the company in New York the entire reserve on the policy, and there pledged and deposited the policy as collateral security for the loan, in accordance with the terms of their loan agreement.

The insured and the plaintiff applied for and obtained four successive loans on this policy, satisfying each existing loan out of the new loan. The procedure in obtaining these loans was the same in each case, and as to the loan in question was as follows,—

(p. 38) "November 12, 1906, defendant, at its Home Office in New York, received the written application of the insured and beneficiary under said policy for a loan of $1,350 on the security of said policy."

The loan application (p. 38) is dated November 9, 1906, addressed to "New York Life Insurance Company, 346 & 348 Broadway, New York," applies for a cash loan of $1,350 on the security of said policy, and is signed by the insured and the beneficiary.

The application for the loan and the loan agreement form in duplicate which accompanied it, were forwarded by the borrowers to the defendant at its Home Office through the defendant's local office in St. Louis (p. 38). Mr. Newton, the defendant's (p. 49) Superintendent of its Division of Policy Loans at its Home Office, charged with the duty (p. 50) of supervising and making loans on policies, says (p. 51),—

> "On November 12, 1906, I received in my division at the Home Office a further application for a loan on this policy, signed by the insured and the beneficiary, which is marked Ballard's Exhibit 'N.' (The appilcation for this loan). I also received at that time a loan agreement signed by

> the insured and the beneficiary, which is marked Ballard's Exhibit 'O.' I accepted this application for the loan."

In applying for this loan, the borrowers at the same time forwarded to the defendant through its local office in St. Louis their signed direction, addressed to (p. 41) "New York Life Insurance Company, 346 & 348 Broadway, New York," directing it out of the proceeds of said loan "to pay the present loan, and premium and interest to October, '07." And Mr. Newton, after accepting the application for the loan (p. 51), applied the proceeds in accordance with the written direction of the insured and beneficiary," and then (p. 51) "transmitted the papers to the defendant's Division of Policy Loan Securities, where all such securities are kept."

The proceeds of each loan, the defendant at its home office applied in accordance with the written direction received there by it from the borrowers (pp. 34, 37, 47). Whenever they took any of it in cash, the defendant paid them the cash by its check on a New York bank. For example, as to the first loan, Mr. Newton drew (p. 50) "the defendant's check for the net proceeds of the loan, $486.91, on the Company's bank account in the National City Bank, in New York" (p. 31 *Ballard's Exhibit F*), and transmitted it through the mails to the insured. And each subsequent loan was similarly settled, except to the extent that Mr. Newton, at the Home Office of the Company, applied the proceeds of the loan as directed by the borrowers to satisfy the existing loan, or to settle premiums on the policy (p. 50 *et seq.*-p. 31 *et seq.*).

In obtaining the first loan, the borrowers forwarded the original policy to the Home Office to be there pledged and deposited with the Company as collateral security for the loan (p. 50), and thereafter the policy remained in the custody of the Home Office as a pledge for the repayment of the indebtedness.

V.

The terms of the loan agreement, which was a contract of loan and pledge made in New York and to be governed by New York laws.

The insured and the plaintiff both signed the loan agreement.

By it (p. 39) they acknowledged that they had received from the defendant a cash loan of $1,350 "conditioned upon pledging as collateral said policy with said Company as sole security for said loan, and giving assent to this policy loan agreement." And they therein agreed (1) to pay interest on the loan at 5% per annum; (2) to pledge the policy as security for the loan "and herewith deposit said policy with said Company at its Home Office"; (3) to pay the sum borrowed when due; (4) that the loan should become due and payable if any premium on the policy was not paid when due, "in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by satisfying said loan in the manner provided in the policy"; and further therein agreed as follows (p. 39),—

"*5. That the application for said loan was made to said Company at its Home Office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said Home Office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said Company.*"

VI.

The lapse of the policy for the nonpayment of the October 20, 1907 premium, the foreclosure of the pledge, and notice thereof to the insured.

(p. 41) "The policy lapsed for nonpayment of the premium due October 20, 1907. The reserve held by the Company on the policy at the time of its lapse was the reserve on the basis of the American Experience Table of Mortality and interest at three per cent per annum," and amounted to (p. 53) $1,348.85.

(p. 41) "The reserve held by the Company on the policy at the time of lapse was less than the amount of indebtedness thereon, and, therefore, after charging the indebtedness against the reserve there was nothing left with which to buy nonforfeiture insurance."

December 17, 1907, the defendant (p. 52) "foreclosed the loan by satisfying it out of the reserve held by the defendant upon the policy, and the indebtedness was cancelled on the Company's books and has always remained cancelled." And on December 17, 1907, the defendant mailed the insured a letter as follows (p. 42),—

"17 December, 1907.

"Mr. Josiah B. Dodge,
4952 Maryland Ave.,
St. Louis, Mo.

Re Policy No. 2054961.

Dear Sir:

"By a loan agreement executed on the 8th day of November, 1906, the above policy on the life of Josiah B. Dodge was pledged to and deposited with the New York Life Insurance Company as collateral security for a cash loan of $1,350.

"The premium and interest due on said policy on the 20th day of October, 1907, not having been

paid, the principal of said loan became due and has been settled according to the terms of the policy, and the policy has no further value.

Yours truly,

JOHN C. MCCALL, Secretary.
By E. M. C."

The insured duly received this letter, for the plaintiff says (p. 14),—

> "I did not make claim after my husband's death on this policy; when we received this letter from Mr. McCall, because we took it for granted that everything was canceled and nothing more was due us. *We relied on this letter, and we would have made claim if it had not been for this letter.*"

VII.

The foreclosure of the pledge conformed to the laws of New York, was fair and just, and the insured and the plaintiff thereby got for their policy its full value and more than the Missouri Statute or the laws of any State provided for or required.

The plaintiff does not claim that this entire transaction did not conform strictly to the New York laws. On the contrary, the evidence is that (p. 55),—

> "The procedure of the defendant with respect to the loans on the policy in suit, and the satisfaction of the loan out of the reserve held by the defendant in the manner testified to by Mr. Smith and Mr. Ballard, conformed in every way to the laws of New York, and constituted, under the laws of New York, a legal, valid and binding foreclosure of a pledge."

The transaction was fair and just, not only because it conformed to the agreement of the parties, but also because the plaintiff and the insured had timely notice of what had been done and if they were not satisfied therewith they could have said so, but they did not.

Besides, the policy provided that the insured could have it reinstated at any time within five years after its lapse, upon (p. 24) "written application to the Home Office with evidence of insurability satisfactory to the Company; payment of premiums from the date to which premiums were duly paid to the date of reinstatement, with interest at the rate of five per cent per annum, and payment or reinstatement of any loans, including payment of any interest due and unpaid." But they never asked to have the policy reinstated, nor did anything else about the transaction, after they received the letter of December 17, 1907.

The sum the Company paid for the policy, namely, $1,350 with five per cent interest thereon from October 20, 1907, to December 17, 1907, that is, $1,366 in all, was in excess of the entire reserve held by it on the policy; it was (p. 54) a higher surrender value than is ordinarily allowed by other insurance companies for the surrender of lapsed policy; it was more than is required by the laws of any state pertaining to the surrender value of policies.

The Missouri statute in question provided for a surrender value of three-fourths of the reserve on the policy at the time of lapse, computed on the Actuary's or Combined Experience Table of Mortality with interest at four per cent, which, according to the plaintiff's evidence, (p. 15) was $942.94.

The New York law provided for a surrender value of (p. 56) "two-thirds of the reserve on the policy computed according to the American Experience Table of Mortality with interest at the rate of four and one-half per cent." The surrender value of this policy at the time

of its lapse, according to the New York law, was (p. 53) $850.50.

Thus the defendant paid for this policy $423.06 more than the Missouri law required, and $560.50 more than the New York law required.

VIII.

Both the insured and the plaintiff were satisfied with this transaction. After the foreclosure of the pledge they never offered to pay any premium, never asked the defendant to reinstate the policy, never claimed the decedent was insured, nor recognized themselves as indebted to the defendant, although the insured lived more than four years thereafter, and they both all the time knew the defendant had satisfied their indebtedness to it out of the reserve held by it on their policy, which left the policy with no further value.

> (p. 49) "No claim was ever made under said policy or no objection was ever made by anybody to the settlement of the indebtedness under said policy in the manner indicated in the letter of December 17, 1907. No one ever offered to pay any of the indebtedness under said policy after the 17th day of December, 1907. All parties treated the indebtedness as paid by satisfying it out of the reserve held by the defendant on the policy after its lapse for the nonpayment of the premium due October 20, 1907. No person did anything inconsistent with said position under which the debt was so satisfied and the policy canceled."

The first word from any source upon the subject of this

policy after the letter of December 17, 1907, was a letter the defendant received from the plaintiff's attorney, dated October 10, 1914, as follows (p. 49),—

> "Mrs. Lea F. Dodge states that she was the wife and is now the widow of Josiah B. Dodge, who died on the 12th day of February, 1912; that her husband carried with you a policy for $10,000.00, and she has employed me to ascertain its condition.
>
> "Therefore, kindly give me the date of policy and the date to which premiums were paid thereon, and also if there was a loan thereon, please give its amount."

From these facts

The Court will notice,—

First.—There is nothing in this record to indicate that the parties to this transaction were not capable of contracting.

Second.—One of them, the insured and the plaintiff, owned a piece of property, a chose in action, which had a specific value at any given time, derived from premium payments, and they elected to use this property as a basis of credit to borrow money.

Third.—The other party had agreed to lend them money "on sole security of this policy on demand at any time," on written application to the Home Office, the loan to "be subject to the terms of the Company's loan agreement."

Fourth.—They applied to the Company at its Home Office for a loan and got it, and they there pledged their policy as security for it in accordance with the terms of their loan agreement.

Fifth.—The contract of loan and pledge was made in New York, "under and pursuant to the laws of the State of New York."

Sixth.—They defaulted in the payment of premium and loan interest, and the pledgee foreclosed the pledge in the manner agreed to by them, by charging the indebtedness against the accumulated value of the policy, which was less than the debt, and hence "the policy had no further value."

Seventh.—This was all in strict compliance with the contracts of the parties and the laws of New York.

Eighth.—The insured never questioned the transaction, although he lived more than four years after it was closed; and the plaintiff never questioned it until more than two years after the insured's death.

Ninth.—And it is questioned now, not because the Company did not perform its contract with them and pay them the full value of their policy, but it is questioned because the Company did not give them for it extended insurance under the Missouri statute of the value of $942.94, instead of giving them $1,366 by cancelling their indebtedness to it in that amount, in accordance with their argeement with it.

Tenth.—By this judgment the owners of the policy have received its value twice, once in cash and once in extended insurance.

Eleventh.—If the owners of this policy could not surrender it in the way they did, they could not surrender it at all. The Missouri statute affected them "with a perpetual contractural paralysis." They could sell it to other buyers, but they could not sell it at all to the likeliest and best buyer, namely, the Company, because they could not give it a good title. For whatever arrangement they made with it, they could not rid themselves of the continued insurance the statute gave them in the event of lapse.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

At the commencement of this brief the plaintiff in error has succintly set forth the errors asserted and intended to be urged. They are set forth in the several Assignments of Errors, commencing at page 78 of the Record, as follows,—

"3. Section 7897, Revised Statutes of Missouri, 1899. as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it denies to the plaintiff in error the equal protection of the law guaranteed to it by the 14th Amendment to the Constitution of the United States.

"4. Section 7897, Revised Statutes of Missouri, 1899, as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it deprives the plaintiff in error if its liberty without due process of law as guaranteed to it by the 14th Amendment to the Constitution of the United States.

"5. Section 7897, Revised Statutes of Missouri, 1899, as construed by the Springfield Court of Appeals in this case is unconstitutional and void, because it deprives the plaintiff in error of its property without due process of law as guaranteed to it by the 14th Amendment to the Constitution of the United States.

"7. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as interpreted and applied in this case was valid and not repugnant to the 14th Amendment to the Constitution of the United States.

"8. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case was not violative of the 14th Amendment to the Constitution of the United States.

BRIEF OF THE ARGUMENT.

I.

New York Life Insurance Company v. Head, 234 U. S., 149, is so much like this case as practically to be decisive of it.

In the *Head* case, the policy was applied for, delivered, and the first premium paid in Kansas City, Missouri. "Hence it was in all respects a Missouri contract," said the Missouri Supreme Court. *Head v. New York Life Insurance Company,* 241 *Mo.,* 403. This policy also was applied for, delivered, and the first premium paid in Missouri.

In the *Head* case, it was agreed in the application "that the policy applied for when issued should be considered as having been issued in New York and be treated as a New York contract;" in this case, it was agreed in the application (p. 19) "that the contract contained in such policy and in this application shall be construed according to the laws of the State of New York, the place of said contract being agreed to be the Home Office of the Company."

In the *Head* case, only the first premium and possibly one other was paid in Missouri; in this case, all the premiums were paid in Missouri, except when they were deducted from loans made in New York. But if the Head contract was a Missouri contract and the Missouri laws a part of it because it was applied for, delivered, and the first premium paid in Missouri, the contract thus made and embracing the Missouri laws did not lose any of its force or become changed because subsequent premiums happened to be paid outside of Missouri. Hence this difference between the two cases is immaterial.

In the *Head* case, the insured was a non-resident of Missouri; in this case, the insured was a resident of Missouri.

But this too is an immaterial difference,—because if each of these contracts was made in Missouri and made there by virtue of the authority the State granted the Company to do business in Missouri, then, as the Courts of Missouri hold, the effect "is to write into every insurance contract made by a foreign insurance company so licensed in this state all of the provisions of the statutes of this state appurtenant to the making of such contract, and which define and measure the reciprocal rights and duties of the parties thereto."

Head v. New York Life, 241 *Mo.*, 403.

Hence if this statute was written into this policy, the insured could not write it out of it by changing his residence or by residing in another state.

Indeed, this Court decided the *Head* case by assuming without deciding "that there was power in the State to treat a contract made for the purpose stated as a Missouri contract, and to subject it as to matters and things which are legitimately within the State authority to the rule of the State law;" and with this assumption your Honors held that the State of Missouri did not have power "to affect the parties to such original contract with a perpetual contractual paralysis following them outside of the jurisdiction of the State of original contract by prohibiting them from doing any act or making any agreement concerning the original contract not in accord with the law of the State where the contract was originally made." And you further held, that Missouri could not extend its authority into New York to invalidate the contract of pledge there made, and the foreclosure of the pledge, which conformed to the laws of New York.

In the *Head* case, the loan was requested by written application sent from New Mexico to New York, accompanied by the policy and an executed loan agreement; in this case, the policy provided that the (p. 22) "application for any loan must be made in writing to the Home Institution

Office of the Company and the loan will be subject to the terms of the Company's loan agreement;" and the application, the loan agreement, and the policy were forwarded to the Home Office through the Company's office in St. Louis. It was expressly agreed in the loan agreement (p. 39) "That the application for said loan was made to said Company at its Home Office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said Home Office, and that this agreement is made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said Company."

In the *Head* case, the loan agreement was foreclosed in New York "in accordance with that agreement, conformable to the laws of New York;" so was it in this case.

In the *Head* case, the Court held, that even "although the original contract was made in the State of Missouri," to refuse to give effect to the loan agreement and its foreclosure,—

(1) Denied the right of freedom of contract;

(2) Took the Company's property without due process of law; and

(3) Permitted "the Statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York," a principle which "lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause."

The *Head* case therefore is so nearly like this case that the Court's decision in the one ought to be decisive of the other.

II.

Missouri could pass a non-forfeiture law, but it could not prohibit the parties from making such fair contract for the disposition of the value of the policy as they wanted to make, without depriving them of their liberty of contract.

1. We do not claim the state could not pass a valid law prohibiting a forefeiture. Such laws have been passed in many states and their validity to the extent that they prevent forfeitures has not been questioned, and we do not question them now.

Massachusetts in 1861 was the pioneer in such legislation. "The purpose of the statute," said the Massachusetts Court, "is merely to establish a rule which will enable the assured to reap the full benefits of the premiums paid before default on his part."

Carter v. John Hancock Ins. Co., 127 *Mass.,* 153 (1879).

"The theory of the legislation is, that the money to be paid is a fund created by the payment of premiums, and that it is to be considered as justly belonging to the insured who has paid them."

Hazen v. Massachusetts Mutual, 170 *Mass.,* 254 (1898).

Without any statute on the subject, this Court recognized the equitable rights of a policyholder who was prevented by the civil war from paying his premiums and whose policy was by its terms forfeited accordingly, and required the Company after the war to pay the policyholder the reserve accumulated on his forfeited policy, the payment to be made on the basis of "the rates of mortality and interest used in the tables of the Company." The Court very properly said,—"This reserve fund has

grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings bank is said to belong to the person who made the deposit."

New York Life v. Statham, 93 *U. S.*, 24 (1876).

The true view of life insurance on the level premium plan is the basis of this Court's decision in

Board of Assessors v. New York Life, 218 *U. S.*, 517; and is further elaborated in the illuminating opinion of the learned trial Court from which the appeal in that case was taken,—

New York Life v. Board of Assessors, 158 *Fed.*, 462.

2. Now let us see what Dodge had in this contract which the state had the right and the power to keep the Company from forfeiting.

Dodge paid the Company seven annual premiums (p. 53) of $263.90 each, or a total sum of $1,847.30. The calculation that required these premium payments was based on the American Experience Table of Mortality and interest at three per cent, plus a reasonable sum to pay running expenses.

Now what was done with what Dodge paid the Company? The answer to this will disclose what he had with the Company subject to forefeiture, and what the state had the right and the power to keep the Company from forfeiting.

One part of what he paid was used in paying the Company's running expenses; another part was used in paying his share of current death losses; and the unused balance was held in reserve as a credit to his policy.

The rates of mortality and interest used in the tables of the Company was (p. 53) "the American Experience Table of Mortality, with interest at three per cent." Accordingly, the unused balance of all the payments he made was, on the date he quit paying (p. 53), $1,348.85.

3. This sum, $1,348.85, the unused balance Dodge had with the Company, the state could say must not be forfeited; *but the state could not, without denying the liberty of contract, prevent the parties from making whatever fair agreement they chose to make, to the end that the insured should get back this $1,348.85 in so many dollars, or in its equivalent in insurance benefits, or in any other proper way.*

And what agreement did they make about it? November 9, 1906, Dodge said to the Company,—"I shall have with you at the end of the current insurance year, October 20, 1907, $1,348.85, which I should like to take down now, or make it even money, $1,350. I will pay you five per cent interest, and if I do not pay the next premium when it becomes due, I shall then have no money with you at all, and I shall have received all the insurance I paid for. Under these circumstances, it will be right and proper for you to cancel the policy, neither of us thereafter to owe the other anything."

To this the Company answered,—"All right, we will do this 'on the sole security of the policy.' Make your written application to the Home Office as your policy requires, and we will do it in accordance with the terms of your policy and loan agreement."

They did all this; and as a result, Dodge took down all his money. He paid no more. Thereupon, after his default, the Company canceled the policy and the indebtedness as they had agreed it should do, and wrote and told him so.

Wasn't this fair? Wasn't it an agreement the parties to it had a natural right to make? Wasn't it fairly performed and satisfactory to both? Was there anything forfeited? In this whole transaction where is there as much as a single penny that Dodge did not get back either in necessary services, or in insurance, or in actual money?

The policy was the property of the insured and the

beneficiary. They had a natural right to do with it as they pleased. If they wanted to sell it, they had a right to sell it. If they wanted to borrow money and pledge it as security, they had a right to do so. The Company, as a money-lender, had a right to lend it on any terms that were fair, and to accept as security the pledge of the policy. And when Dodge quit paying premiums, the Company had a right to settle the indebtedness in accordance with the loan agreement and the policy and the laws of New York; and Missouri could not deny them any of these rights without depriving them of their liberty of contract.

4. But what does Missouri say to this perfectly fair, just and proper transaction, in all respects in accordance with the rights and agreements of the parties and the laws of New York where Dodge's policy required him to apply, and where he did apply, for the loan, where he pledged his policy, and where the foreclosure occurred?

Missouri says,—

(*a*) The policy was applied for, delivered, and the first premium paid in Missouri, and hence was a Missouri contract and this non-forfeiture law is a part of it.

(*b*) As different companies calculate their premiums and carry their reserves on different bases, the non-forfeiture law takes an average basis for calculating the accumulated value of the insured's policy at the time of its lapse, namely, the Actuary's or Combined Experience Table and interest at four per cent, and prohibits the Company from forfeiting three-fourths of this accumulated value. That is, in this case, the accumulated value of Dodge's policy at the time of its lapse, valued according to the non-forfeiture law, was (p. 15) $1,257.25, three-fourths of which, $942.94, could not, according to the Missouri law, be forfeited.

Down to this point we do not care to dispute anything. But the state goes farther and says,—

(*c*) This $942.94 must be used to pay premium notes, if any, and the balance must be applied to purchase continued insurance; and no matter what the parties in interest want to do, it cannot be used, paid, settled, or employed in any other way.

In other words, by this statute, as construed and applied by its courts in this case, the state has absolutely destroyed the liberty of contract of the parties to this transaction about this property. So that if they had all come together and agreed, and executed their agreement, the one to give and the other to receive $942.94 in cash instead of continued insurance, their act would have been futile. Nay, when they did come together and agree, and executed their agreement, the one to give and the other to receive,—not $942.94, three-fourths of the statutory value, nor even $1,257.25, the full statutory value,—but $1,350 plus nearly three months' interest thereon, a trifle more than the full, true and exact accumulated value of this very policy, so that the insured no longer had a single penny in the Company's hands, and all were satisfied with what they had done, the state said their act was futile; that they could not make such a contract; that the non-forfeiture law of the state displaced their will, and paralyzed and destroyed their contractual powers.

5. The Missouri non-forfeiture law, as extended in this case into the property in question so as not merely to prohibit its forfeiture, *but to deny the right or power to use, dispose of, or deal about it in any way whatever, and, whether the parties interested in it so wished or not, to compel the use of it in the narrow way the statute states,* is clearly an arbitrary interference with the right of contract, having no just relations to the protection of the public within the scope of legislative power.

What was there about this particular property more than about any other property that justified the state in

saying that the persons who equitably owned it and the person who held it could not make any fair agreement with each other about it they wanted to make?

Did their deliberate, voluntary, and unrestrained dealing about it as a result of which the one sold it and the other bought it for a cash consideration far in excess of the value the Missouri statute put upon it have anything in the world to do, directly or indirectly, with the lives, the health, the morals, the comfort, or the general welfare of the people of Missouri, any more than had any other business transaction between private persons involving a like amount?

Suppose the Company, instead of equitably owing Dodge the accumulated value of his policy, had owed him a legal debt for money borrowed,—Could the state say the parties could not make any fair agreement they wanted to make for the settlement of the debt? Could the state say they must settle it in just one way and in no other? If it could not, then upon what theory can the state deny full liberty of contract about a mere equitable claim?

The law which on this aspect of the case controls it, is so familiar to this Court that I do not feel justified in discussing it. Some of the decisions illustrating its application are the following,—

Lawton v. Steele, 152 *U. S.*, 133.
Allgeyer v. Louisiana, 165 *U. S.*, 578.
Adair v. United States, 208 *U. S.*, 161.
McLean v. Arkansas, 211 *U. S.*, 539.
Smith v. Texas, 233 *U. S.*, 630.
Ala. & N. O. T. Co. v. Doyle, 210 *Fed.*, 173.
Geiger-Jones Co. v. Turner, 230 *Fed.*, 233.
People v. Gilson, 109 *N. Y.*, 389.
State v. Dalton, 22 *R. I.*, 77.
Ex parte McKenna, 126 *Cal.*, 429.
Long v. State, 74 *Md.*, 505.

To undertake to say, therefore, that these parties could not make this fair contract and dispose of this property in the way they did for its full value in cash, is not a proper function of the state, nor within the state's powers. Clearly it is a trespass upon private right and a denial of the liberty of contract.

III.

After the company foreclosed the pledge, Missouri could not ignore the foreclosure and give the foreclosed policy a value in favor of those whose interest in it the foreclosure had cut off, and not thereby take the defendant's property without due process of law.

1. Loans of this character and their foreclosure in the way the loan in question was foreclosed, are authorized by the following provision of The New York Insurance Law,—

> *"Any life insurance company may lend to any policyholder upon the security of the value of his policy a sum not exceeding the lawful reserve which it holds thereon, and such loan shall become due and payable and be satisfied as provided in the loan agreement or policy."*
>
> *The Insurance Law of New York,* §16.

In New York, "the parties to such a transaction, which thus creates the relation of pledgee and pledgor between them, may provide by contract for any manner of disposing of the pledge to satisfy the claim upon it."

Baker v. Drake, 66 *N. Y.,* 518.
Milliken v. Dehon, 27 *N. Y.,* 364.

Toplitz v. Bauer, 34 *N. Y.* (*A. D.*), 526.
Williams v. U. S. Trust Co., 133 *N. Y.*, 660.
Jenet v. Howland, 45 *Bar.*, 560.
In re Mertens, 144 *Fed.*, 818 (*C. C. A., 2nd C.*).

"The authorities are uniform upon the question that the disposition to be made of a pledge may be regulated by the contract of the parties."

Hunter v. Hamilton, 34 *P.*, 782 (*Kas.*).

The New York Courts have, without any exception, sustained the validity and finality of the foreclosure of a pledge in the way it was done in this case.

Clare v. Mutual Life, 201 N. Y., 492.
Palmer v. Mutual Life, 38 *N. Y. Misc.*, 318.
Hayes v. New York Life, 124 *N. Y. Sup.*, 792.

And similar decisions have been rendered in many jurisdictions. There are no exceptions thereto so far as I know.

Eagle v. New York Life, 48 *Ind. App.*, 284.
Wilson v. Royal Union, 137 *Ia.*, 184.
Frese v. Mutual Life, 11 *Cal. App.*, 387.
Meridian Life v. Hobbs, 76 *So.*, 429 (*Ala.*, 1917).
Hartford Life v. Benson, 187 *S. W.*, 351 (*Tex.*, 1916).
Mills v. National Life, 136 *Tenn.*, 350.
Sherman v. Mutual Life, 53 *Wash.*, 523.
Salig v. United States Life, 236 *Pa.*, 460.
Palmer v. Mutual Life, 114 *Minn.*, 1.

In *Hayes v. New York Life*, 124 *N. Y. Sup.*, 792, the Court said at page 797,—

> "It seems to me that the parties by their contract agreed that the policy was satisfactory security for loans as long as it was continued in its original form; that, so soon as by nonpayment

of premium the original contract was terminated, it no longer represented a satisfactory security; and that, to secure the extended insurance, the insured was bound to pay the debt which he owed the Company, and that, *if that debt was not promptly paid, the company had a right to cancel the policy for its surrender value.* It did cancel the policy in this case, and sent the insured a check for the amount of the surrender value in excess of the amount due to it. *I find nothing inequitable in such a surrender. On the contrary, it was exactly what the parties had agreed that the Company could do under these circumstances.*"

And the *Hayes* decision was affirmed by the Appellate Division—*Hayes v. New York Life,* 150 *App. Div.,* 927, and by the Court of Appeals, *Hayes v. New York Life,* 211 N. Y., 9.

In *Palmer v. Mutual Life,* 38 *N. Y. Misc.,* 318, the Court said,—

"The debt became due and was unpaid at maturity. The defendant was under no obligation, and probably possessed no power to maintain the policy until its maturity by the payment of premiums thereon; *on the other hand, it then had the right, both in law and by its express agreement with the plaintiff, to secure the payment of its debt by disposing of or realizing upon the pledge of the policy in the form and manner prescribed.* Owing to the peculiar nature of that property it could not make a sale thereof for these purposes, and it was, therefore, necessary to dispose of the policy in some way, and to determine in some way its value as of the time of the default. Instead of, as in the case of an ordinary pledge, leaving the value to be determined by a sale by the pledgee as trustee for the pledgor, the parties agreed that the value of the pledged policy should be its customary cash surrender value, and agreed upon that value in advance; and the defendant secured the same for the benefit of itself as a creditor and of the plaintiff as pledgor by the cancellation of the policy in

> accordance with the agreement and with the practice of companies such as the defendant. The defendant has done no more than the law permits the ordinary creditor with whom property is pledged to do, and no more than the parties agreed that it should have the right to do."

Therefore, the validity of the pledge foreclosure under the laws of New York is not only not here questioned, but it could not be successfully questioned. The foreclosure canceled the debt and the policy. It ended all contractual relations between the parties. As the New York Court said of a similar situation in *Palmer v. Mutual Life, supra,*—

> "The property pledged as security for the defendant is not now owned, held or possessed by the defendant; it is no longer in existence; in accordance with law and with the agreement of the parties, it has been disposed of in the only manner possible and as agreed upon by the borrower and lender."

2. But the plaintiff says, the loan agreement is a Missouri contract because (p. 14) she and the insured signed it in St. Louis and "all the transactions concerning policy and loans were had in Missouri."

If this is material, the answer to it is two-fold,—

First.—If the loan agreement were a Missouri contract, that fact would not in any respect affect the natural right of one of the parties to borrow and the other to lend money on the pledge of this policy as security, nor would it change the character of the pledge or the necessary legal effect of the foreclosure of the pledge.

In Missouri the law of pledge seems to be the common law, and any reasonable agreement for disposing of the pledged property and realizing on the security is valid and binding there as elsewhere.

Chonteau v. Allen, 70 *Mo.,* 290.

Hence the pledge would be as valid and its foreclosure as final in Missouri as anywhere.

Second.—The other answer to the plaintiff's claim that the loan contract is a Missouri contract is, that it is not,—it is a New York contract and the policy was pledged and deposited, and the pledge foreclosed, in New York.

The policy provided that (p. 22) "The application for any loan must be made in writing to the Home Office of the Company, and the loan to be subject to the terms of the Company's loan agreement."

Pursuant to this provision of the policy, the insured and the plaintiff addressed their written application for the loan to the (p. 28) "New York Life Insurance Company, 346 & 348 Broadway, New York," and sent with it the policy and the "Company's loan agreement duly signed in duplicate," and their written instructions addressed to (p. 41) "New York Life Insurance Company, 346 & 348 Broadway, New York," for the disposition of the proceeds of the loan.

The application, the loan agreement, the policy, and the borrowers' instructions for the disposition of the proceeds of the loan came into the hands of the Superintendent of the Division of Policy Loans, at the Home Office, where he (p. 51) "accepted this application for the loan and applied the proceeds in accordance with the written direction of the insured and the beneficiary." And when he had done this, he (p. 51) "transmitted the papers to the defendant's Division of Policy Loan Securities" in the Home Office.

The Superintendent of the Division of Policy Loan Securities (p. 51) "took charge of the papers pertaining to the loan transaction on policy No. 2,054,961 on the life of Josiah B. Dodge, and held them under the Company's rules and practice down to the time of the foreclosure of the loan in 1907."

All loan checks were drawn upon and paid out of the Company's deposit in bank in New York (pp. 31, 55),

and wherever the money borrowed was not forwarded by check drawn on the Company's bank account in New York, it was applied at the Home Office in the manner directed by the insured (pp. 50, 51).

In the loan agreement the parties expressly agree as follows,—

> "That the application for said loan was made to said company at its home office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said home office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said home office of said company."

The insured and the plaintiff forwarded these loan papers through the defendant's St. Louis Office, but by choosing that instrumentality for forwarding them they could not change the character of the transaction as a New York contract, nor annul their agreement last above quoted from the loan contract.

"A contract is governed by the law with a view to which it was made."

Wayman v. Southard, 10 *Wheaton,* 1, 48.

"The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed."

Robinson v. Bland, 2 *Burr.,* 1077.

"The law upon which the nature, interpretation and the validity of a contract depend is that which the parties have either expressly or presumptively incorporated into it as constituting its obligation."

Pritchard v. Norton, 106 *U. S.,* 124, 136.

Liverpool Steam Company v. Phenix Insurance Company, 129 *U. S.*, 397.
United States v. North Carolina, 136 *U. S.*, 211.

"It is competent for the parties to a contract to agree as to what law shall govern in its construction and enforcement, and when they do so agree that agreement is not simply binding upon them but is also binding upon the Courts."

Liverpool Steam Company v. Phenix Life Insurance Company, 129 *U. S.*, 397.
Coughlan v. So. Carolina Railroad Company, 142 *U. S.*, 101.
Hall v. Cordell, 142 *U. S.*, 115.

But the plaintiff says the insurance contract was made in Missouri which admitted the defendant to transact its business there and the Missouri Laws were a part of it; and that, therefore, the parties could not go into New York and make a contract of loan and pledge, the foreclosure of which would defeat an insurance policy made in Missouri.

The answer to this is, that if we admit they made the insurance contract in Missouri, nevertheless they agreed therein that, to create the relation of borrower and lender the insured and beneficiary must apply in New York and agree "to the terms of the Company's loan agreement." And borrowing from the Company created a new relation between the parties, the relation of borrower and lender and all the papers creating this new relation were made and delivered "under and pursuant to the laws of the State of New York, which was the place of the contract."

This new relation of borrower and lender is distinct from the parties as insurer and insured. Missouri itself recognizes the difference in these relations.

In *Smith v. Mutual Benefit*, 173 *Mo.*, 329, the Supreme Court of Missouri said,—

> "The borrowing of the money for a purpose other than the payment of a premium, and the assignment of the policy as collateral security for the loan, put the parties, as to that item, in a new relation to each other. By virtue of the policy and the premium, the parties stood in the relation of insurer and insured, and the law of insurance governed them in that relation; *but when the assured borrowed money of the insurer, and assigned the policy as collateral security, the law governing their rights in that respect is the same as if he had borrowed the money from a bank and given it the same collateral.*"

So that when the insured and beneficiary applied for and obtained a loan in New York and pledged the policy there as security, and agreed that the transaction should be governed by the laws of New York, their new relation is governed by the laws of New York; and under the laws of Missouri itself "the law governing their rights in that respect is the same as if he had borrowed the money from a bank and given it the same collateral"

3. To entertain a suit commenced in 1915 on a policy which then had no existence and which had had no existence since the foreclosure in 1907 cut off all interest of the plaintiff in it, and to render judgment against the defendant upon this non-existent contract, is to take the defendant's property without due process of law.

Suppose Dodge had never taken out any policy at all and the plaintiff had sued the defendant by her present complaint, and the answer and undisputed evidence were that Dodge had never taken out a policy, and yet, after a trial conforming in all respects to the customary forms of procedure, the Court rendered judgment against the defendant as it has done here,—Would not such a judgment be an invasion of the property rights of the defendant against which this Court would protect it?

And what is the difference between the present case and the supposed case, if effect is to be given to the fore-

closure of the pledge? If under the laws of New York the pledge foreclosure cut off, as it did, all interest of the plaintiff in this policy and destroyed all relation of insurer and insured as well as creditor and debtor, the plaintiff's position at the trial was precisely the same, and the judgment in her favor is just as much an invasion of the defendant's property rights, as would be a like trial and judgment in the case supposed, where Dodge never took out any policy at all.

The allegations of the answer, the proof of the loan, the terms of the loan agreement, the pedge of the policy, the default, the foreclosure, the satisfaction of the indebtedness and the cancellation of the policy, the legal effect of it all under the laws of New York, are not denied or disputed in this case,—*they are ignored;* and by ignoring them the paintiff, without any color of right, is given this judgment.

It will not do to say that if there is any injustice here it is mere error with which this Court has nothing to do. It was not error to say the indebtedness still existed,—it was an arbitrary and unjustified statement. It was not error to ignore the foreclosure and the cancellation of the policy,—it was willful, and intentionally wrong. It was not error to render judgment on a contract which had no existence,—it was forcibly taking the defendant's property without due process of law.

But the plaintiff says we had our day in court,—notice an opportunity to be heard, and a full hearing,—and that this is due process of law.

But our day in court is not due process of law. The provisions of the constitution protecting the property of persons "extends to all acts of the State, whether through its legislative, its executive or its judicial authorities."

Scott v. McNeil, 154 *U. S.,* 34.

And in the case last cited this Court reversed a judg-

ment of the highest Court of the State of Washington in favor of the vendee of an administrator of the estate of a person adjudged to be dead on account of long absence, although he was not in fact dead.

In *C., B. & Q. R. Co. v. Chicago*, 166 *U. S.*, 226, the condemnation proceedings against the railroad company's property were regular and complied with all the requirements of law, but the jury only awarded the Company a dollar for property which it claimed was worth much more; and this Court entertained a writ of error and passed upon the merits of the case, because "a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law, regard must be had to substance, not to form."

"The judicial act of the highest court of the state in authoritatively construing and enforcing its laws is the act of the state."

Twining v. New Jersey, 211 *U. S.*, 78.

> "If the effect of the judgment of the State Court has been to take the property of the citizen without compensation, no matter what form the procedure has taken, it is violative of the 14th Amendment to the Constitution. If this were not so, the state, by adopting forms of procedure and enforcing laws which operated to take private property without compensation, could deny the citizen the protection which the 14th Amendment was intended to give against all forms of state action."

Brand v. Union Elev. R. Co., 238 *U. S.*, 586.

> "Whoever, by virtue of public position under a state government, deprives another of property,

> life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or evade it."

Ex Parte, Commonwealth of Virginia, 100 *U. S.,* 676.

This judgment, therefore, is an act of the state, and the state cannot, without color of right, take the defendant's property and give it to the plaintiff, even although it observes the established forms of legal procedure in doing so. Not disputing any of the facts which in 1907 cut off all the plaintiff's interest, indeed admitting the loan and the default, and not denying the foreclosure and its legal effect, the plaintiff clearly had no color of right. Under the undisputed facts, her position was just the same as if her decedent had never taken out any policy at all. She did not even have the foreclosed policy. She did not know how much it was for (Ex. R, p. 43), nor anything definite about it until the defendant in October, 1914, told her (Ex. S, p. 43) and mailed her lawyer a photograph of the original policy (Ex. U, p. 45). On the trial, she had no contract to produce and produced none; the defendant produced the original policy which bore the stamp (p. 28),—"*Surrendered under terms of policy loan agreement Dec. 17, 1907.*" The plaintiff had nothing, nor the appearance of anything, except a life insurance company for defendant.

IV.

The Missouri Statutes, as construed and applied in this case, denies the Company the equal protection of the law, because it discriminates between it as a money-lender on the one hand and every other money-lender on the other, and deprives it of every right and of every remedy commonly accorded to a pledgee of property.

When, on the written application of Dodge and the plaintiff, the Company loaned them the full amount of the accumulated value of their policy and received from them the pledge of the policy as security, it was doing precisely what any other money-lender might do, and what it or any other money-lender had a perfect right to do. There is, however, this one difference between it and most other money-lenders, namely, that the state deems it so important for life insurance funds to be safely invested as to designate by statute what securities such corporations may invest in, and expressly to prohibit them from loaning upon any "obligations which shall not be secured by *adequate collateral security.*"

The Insurance Law of New York, Secs. 100 *and* 16.

And the State of New York must have thought policy loans would be adequately secured, because one of its laws is,—

"Any life insurance company may lend to any policy-holder a sum not exceeding the lawful reserve which it holds thereon, and such loan shall become due and payable and be satisfied as provided in the loan agreement or policy."

The Insurance Law of New York, Sec. 16.

Now suppose any other money lender had loaned Dodge and the plaintiff $1,350 on the pledge of this policy as security, and they defaulted, so that under the law and by the terms of the pledge agreement the lender had a right to foreclose and did foreclose the pledge, the lender himself becoming the purchaser in accordance with the terms of the loan agreement, at a fair price therein also agreed upon,—What would be the status of the parties?—

First.—Such foreclosure would satisfy the indebtedness out of the price paid for the collateral and end the relation of debtor and creditor.

Second.—It would cut off once and for all every interest of Dodge and the plaintiff in the insurance, and transfer it to the pledgee who thereafter would own it absolutely.

Under this decision of the Missouri court, is this the position of the Company here as a money-lender? All it asks is the right accorded to every other money-lender, namely, the right to take security which shall make it secure, and, in case of default, to realize on the security by disposing of it in accordance with law and the contract, to the end that it may, like any other money-lender, collect its debt and not lose it.

But all these rights, conceded to every other money-lender, the state has denied to it. It accepted the policy as a pledge to secure the payment of money loaned, but the state refused to recognize the pledge. When default occurred, it foreclosed the pledge and purchased the pledged property at the price it had agreed to pay, satisfied the indebtedness, and notified the borrowers that their indebtedness was paid, and that the foreclosure canceled the policy which was no longer of any value. But the state utterly ignored all this, and treated it as an absolute nullity,—although it conformed in all respects

to the requirements of the law of pledge and the agreements of the parties, and if done by any other money-lender its validity and finality would not be questioned, whether it was done in New York or in Missouri.

Any other person lending money on the pledge of this policy as security would have had security to the extent of the value of the policy; but the Company lending money on it got and could get, as the Court holds, no security at all,—except possibly to the extent, if any, that the borrower elected to pay premiums with what he borrowed. To be sure, in *Smith v. Mutual Benefit*, 173 *Mo.*, 329, the Court suggested that the pledge really did give the Company some security, because "as the assured might die within the extended period of the policy, we cannot say that there was no security at all." But this comes, not from the pledge, but from the common law right of set-off, the beneficiary being one of the borrowers. To the insurance company alone, of all money-lenders, the pledge of the policy is for all practical purpose void and is no security at all.

Any other person lending money on the pledge of this policy as security would have had the right to foreclose the pledge in the event of default, and by the foreclosure to cut off all interest of the borrowers in the property pledged; but the Company as pledgee could not do this. Its foreclosure of the pledge, as the court holds, did not accomplish anything at all. No one's rights, property or interests, not even its own, were changed or affected in the slightest by what it did. It was all just as if there had been no pledge, no default, no foreclosure, no application of the accumulated value of the policy to the liquidation of the debt, no cancellation of the debt and of the policy, no mutual assent to it at all and satisfaction with it all.

This is not equal protection of the law,—it is discrimination; a refusal to recognize or enforce the obligations of the contracts these parties made; a denial of all the

ordinary rights and all the ordinary remedies accorded to every other person who lends money on the pledge of property as collateral security.

V.

But the plaintiff says, foreign insurance companies which do business in Missouri must conform to Missouri laws; that this non-forfeiture statute is a Missouri law, the validity of which the courts have sustained; and therefore that the owners of this policy had continued insurance. And as I understand it, this is the full extent of the plaintiff's claim. They say nothing at all about the insured and the plaintiff taking down their entire reserve,—leaving nothing to pay for continued insurance, nothing to save, and nothing to forfeit. They say nothing at all about the loan contract and the pledge, and the foreclosure of the pledge.

Now let us just see how far these claims of the plaintiff are true, and to what extent, if at all, they justify this judgment.

1. We do not deny that as a foreign insurance company doing business in Missouri the defendant must conform to Missouri laws. But a Missouri statute which, as construed and applied by the Missouri courts, violates constitutional rights, is not a Missouri law. It is an unconstitutional statute and therefore void.

Nor does a corporation of one state by going into another state to transact its business, thereby lose or forfeit any of its constitutional rights or guarantees.

A state may exclude a foreign corporation. It may admit it upon conditions, but it can impose no condition

which will deprive the corporation of its constitutional rights. Wherever a corporation goes, it carries with it the protection the federal constitution gives it at its home.

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state (*Bank of Augusta v. Earle*, 13 *Pet.*, 519, 10 *L. ed.*, 274). This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states and by this Court, *provided they are not repugnant to the Constitution or laws of the United States.*—" MR. JUSTICE CURTIS in

Lafayette Ins. Co. v. French, 18 *How.*, 404.

In *Southern Pacific Company v. Denton*, 146 *U. S.*, 202, the Court held that a state could not require a foreign corporation to surrender a privilege secured to it by the Constitution of the United States as a condition of doing business in the state. MR. JUSTICE GRAY said in that case,—

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, *to surrender a right and privilege secured to it by the Constitution and laws of the United States*, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

MR. CHIEF JUSTICE WHITE, reviewing the cases on this subject, lately said in the case of *Harrison v. Railroad Company*, 232 *U. S.*, 318,—

> "Indeed, the ruling in the Herndon Case and in those subsequent to the Doyle and Prewitt Cases, most of which were reviewed in the Herndon Case, demonstrates that no authority is afforded by those two cases for the conception that

> it is within the power of a state in any form, directly or indirectly, to destroy or deprive of a right conferred by the Constitution and laws of the United States."

And still later MR. JUSTICE DAY said,—

> "Furthermore, the Phoenix Company is a foreign corporation, whose license to do business in the State of South Carolina would expire upon the 1st day of April, 1912, and, therefore, it was within the power of the state, so long as it did not impose upon the company as a condition of doing business within the state any deprivation of rights secured to it under the Federal Constitution, to determine for itself the conditions upon which such foreign corporation could do business within the state."

South Carolina v. Phoenix Mutual, 237 *U. S.*, 63.

The cases on this subject are numerous. Some others applicable to this situation are,—

Ducat v. Chicago, 10 *Wall.*, 410.
Home Life Insurance Company v. Morse, 20 *Wall.*, 445.
St. Clair v. Cox, 106 *U. S.*, 350.
Barron v. Burnside, 121 *U. S.*, 197.
Southern Pacific v. Denton, 146 *U. S.*, 207.
Cargill Company v. Minnesota, 180 *U. S.*, 452.
Security Mutual v. Prewitt, 202 *U. S.*, 246.
Herndon v. Railway Company, 218 *U. S.*, 135.

2. But as matter of fact Missouri did not exact obedience to this non-forfeiture statute as construed by its Courts as a condition of the Company's admission to do business in the state.

The defendant was admitted to do business in Missouri many years before it made this policy, or its courts, in 1903, first gave this statute the construction it now gives it. The record is not complete on the history of the Company's business in Missouri, because it was not

foreseen that it might be of interest; but the plaintiff's amended petition alleges (p. 63) that at all of the dates mentioned in the petition "*and prior thereto* the defendant was, and still is, a resident and citizen of the State of Missouri, and pursuant to the laws of the State of Missouri defendant maintains, and has at all of said dates maintained, several offices in the State of Missouri; that at all of said dates prior and subsequent thereto the defendant was and now is transacting the business of life insurance in the State of Missouri."

Filing with the Superintendent of Insurance a copy of the Company's charter, and a sworn statement of the condition of its affairs, and its last annual report, was all the Missouri laws required the Company to do to be admitted to transact its business within the state (R. S., 1899, §7883). When it made this policy, the defendant then was, and long had been, a corporation transacting business in Missouri, duly licensed by the state for this purpose. Its license had been renewed annually. The only requirement prescribed by law for renewing it was, that the Company should file with the Superintendent of Insurance its annual statement, thereby satisfying him that the Company was solvent (R. S., 1899, §7888).

At the time the defendant made this contract, the courts of the state had not construed this non-forfeiture law as they later construed it. Indeed, no one ever dreamed of the present construction of the statute until the Supreme Court of the State, March 20, 1903, first gave it this construction in the case of *Smith v. The Mutual Benefit*, 173 *Mo.*, 329. And no sooner did the Court attribute to the Legislature the intention expressed in the decision in *Smith v. The Mutual Benefit*, than the Legislature, which happened to be in session at the time, repudiated any such intention by promptly passing House Bill 423, Laws of Missouri, 1903, page 208, amending the non-forfeiture law so as to make it

consistent with justice and constitutional right. This amendatory act, the Governor approved March 27, 1903, exactly seven days after the decision of the Court in *Smith v. Mutual Benefit.* So that, so far as the Legislature of Missouri could bring it about, this non-forfeiture statute as construed by the courts of Missouri was only on the statute books of the state seven days; and their prompt action makes it clear that they never meant by the statute what the Court said they meant.

Moreover, this non-forfeiture law is not, and does not purport to be, a statute imposing a condition upon foreign life insurance companies as a right to do business in the state.

It is true that in the case of *Cravens v. New York Life Insurance Company,* 148 *Mo.,* 583, the Court in the course of the argument, stated the general proposition of law that "the state may prescribe conditions upon which it will permit a foreign insurance company to transact business within its borders, or exclude them altogether, and in so doing violates no contractual rights of the company." But the Court nowhere said that compliance with this statute was prescribed as a condition upon which a foreign insurance company could be admitted to do business in the state; nor did the Court intimate or suggest that the statute was not a general statute, applicable alike both to foreign and domestic companies.

The statute plainly applies to all insurance companies, domestic as well as foreign. Its language is,—"No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state," and so forth. Therefore, the statute is applicable to policies issued by domestic companies just the same as it is to policies issued by foreign companies. It affects them all alike. An act which applies to corporations generally, domestic as well as foreign, is not a statute prescribing conditions upon which a foreign corporation may do business within the state. Hence the

fact that the state might prescribe conditions upon which a foreign corporation would be admitted to do business within the state has nothing to do with this case, because this is a statute of general application and does not purport to impose such conditions.

American Surety Company v. Shallenberger, 183 *Fed.,* 636, *and cases cited.*

3. Now let us see what there is to the plaintiff's claim that the Federal Courts have sustained the validity of this statute. The plaintiff bases this claim on the decision of this Court in *New York Life v. Cravens,* 178 *U. S.,* 389.

In the *Cravens* case, the insurance company made a policy in Missouri which provided for paid-up insurance in the event of lapse, "on demand made within six months after such lapse," and waived "all other nonforfeiture benefits given by any statute."

The question there was, whether, after the lapse of such a policy and the failure of the insured to demand paid-up insurance, the automatic continued insurance obtained under the statute. In the *Cravens* case, the insured had not taken down the accumulated value of the policy. There was no question there of the right of the parties to dispose of their property for its full value in cash. Nor was the Court there asked to hold that they still had insurance years after the valid foreclosure in another state of the pledge of their policy to secure a debt for borrowed money.

This Court stated the question before it in the *Cravens* case as follows,—

> "Our view is only invoked to that part of the opinion which provides that the Missouri statute is the law of the policy and which annuls the provisions of the policy which contravene the statute."

And the Court held that the Missouri Court had a perfect right to hold that the insurance company could not waive the automatic continued insurance under the statute, by providing in the policy for non-forfeiture benefits which were only obtainable upon demand made within six months; and the Court did not dissent from the holding of the Missouri Court, that such paid-up insurance on demand made within a limited time after lapse, was not a fair equivalent for the automatic continued insurance provided for by the statute.

But the Court did not say in the *Cravens* case that if the insured and the beneficiary had taken down the entire accumulated value of the policy and had nothing to forfeit they would have insurance nevertheless. The Court did not say in that case that the parties who owned the property could not dispose of it in whatever fair way they chose. Nor did the Court there say that if the parties pledged the policy in another state as security for borrowed money, and the pledge was duly foreclosed, and under the laws of the other state the foreclosure cut off all their interest in the policy, they nevertheless had insurance.

We make no criticism of the *Cravens* case. We do not see that it has any application to any of the questions upon which we here base our right. We are perfectly willing for the Court to hold in this case as it held in the *Cravens* case that the Missouri non-forfeiture law was a part of our policy. That is no reason for holding that the owners of the policy could not take down their reserve, or deal about the value of the policy. It is no reason for holding that, if they did take down the entire value of the policy and had nothing to forfeit, the non-forfeiture law could help them. It is no reason for holding that, after they pledged their policy in New York as security for borrowed money and after default the pledge was duly foreclosed, and as a result of the foreclosure their indebtedness was satisfied and the policy

was cancelled and had no further value, nevertheless they still had insurance under the foreclosed policy.

In the *Head* case (234 *U. S.*, 149) the plaintiff made the same claim the plaintiff makes now,—that the questions in the case had been disposed of by prior decisions of the Court. But in the *Head* case the prior decisions came just as near to disposing of the questions in that case as they come to disposing of the questions in this case,—that is, they did not touch them at all.

There is nothing mysterious about the extent of the State's power in a case like this, except the fact that it has confused some courts. The State may prevent forfeitures, because life insurance is a business effected with a public interest, which therefore the state may regulate; and a proper regulation is to prevent the forfeiture, under a contract which the company drew and which the insured possibly did not fully understand, of the policy value accumulated as the result of the insured paying in the early policy years more than enough to pay his share of the current cost of insurance and expenses, and which, therefore, equitably belongs to him; and as an incident to preventing a forfeiture, the state may say what shall be done with the unforfeited value,—in the absence of any reasonable agreement of the parties which will otherwise save for the insured the value of all he over-paid.

But the state's power is limited to saving for the insured the accumulated value resulting from his overpayments. How he shall receive this value is for him and the insurer to say, if they want to say, and their agreement is reasonable and fair. The state has no more power to tell them they must do just one thing with it and can do no other than it has to tell any other debtor and creditor just how they shall settle with each other, and prohibit them from making any other settlement.

When two persons have dealings with each other, which result in money accumulating in the hands of one of them

that equitably belongs to the other, the state cannot say they must use the money so held in just one way. If it did, the state would thereby substitute its will for theirs; it would deny them all liberty of contract; and it would make for them a hard and fast, narrow, fixed, and unchangeable contract, whether it was the contract the parties in interest wanted to make or not, or whether it was the contract best suited to their present condition or not.

Such action of the state is not merely preventing a forfeiture;—it is going far beyond this. If the state said the Company must give the insured the accumulated value of his policy in coal, could not the parties agree to pay its value in flour if the insured wanted flour and did not want coal? Having received and accepted its value in flour, could the state say the Company must again pay its value in coal? And when the insured here said he wanted the value of his policy in money and the Company gave him its value in money, was not this a thing which they both had a right to do? Can the state say the Company must again give its value in continued insurance?

And when the insured and the plaintiff pledged their policy in New York as security for the repayment of its accumulated value, which they then took down, what did they have left to forfeit? After that, what was there for a non-forfeiture law to save?

Moreover, having received the policy's entire value, did they pledge its entire value, or only a part of its value, to secure the repayment of what they got? And when they defaulted and the Company foreclosed their pledge just as they agreed it should do, did the foreclosure cut off all their interest, or only a part of their interest? If it cut off all their interest, then the plaintiff had nothing on which to base this suit. If it cut off only a part of their interest, then the pledge was not only unfair and deceptive, but it violated the law of New York which pro-

hibited the Company from making a loan without adequate collateral security; it was not the pledge the parties agreed to make, all tried to make, and all believed they had made. And this was so, solely because the Missouri statute as construed by the Missouri Court denied the parties their liberty of contract.

But under their contract and the laws of New York, the pledge of the policy was complete and its foreclosure cut off all their rights. And Missouri could not extend her authority into New York to prohibit the pledge, or to invalidate what was lawfully done there, nor, by ignoring the foreclosure in New York, give the plaintiff something for nothing, without denying the parties their liberty of contract, taking the defendant's property without due process of law, and denying it the equal protection of the law.

Respectfully submitted,

JAMES C. JONES,
Attorney for Plaintiff.

JAMES H. McINTOSH,
Of Counsel.

October, 1917.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

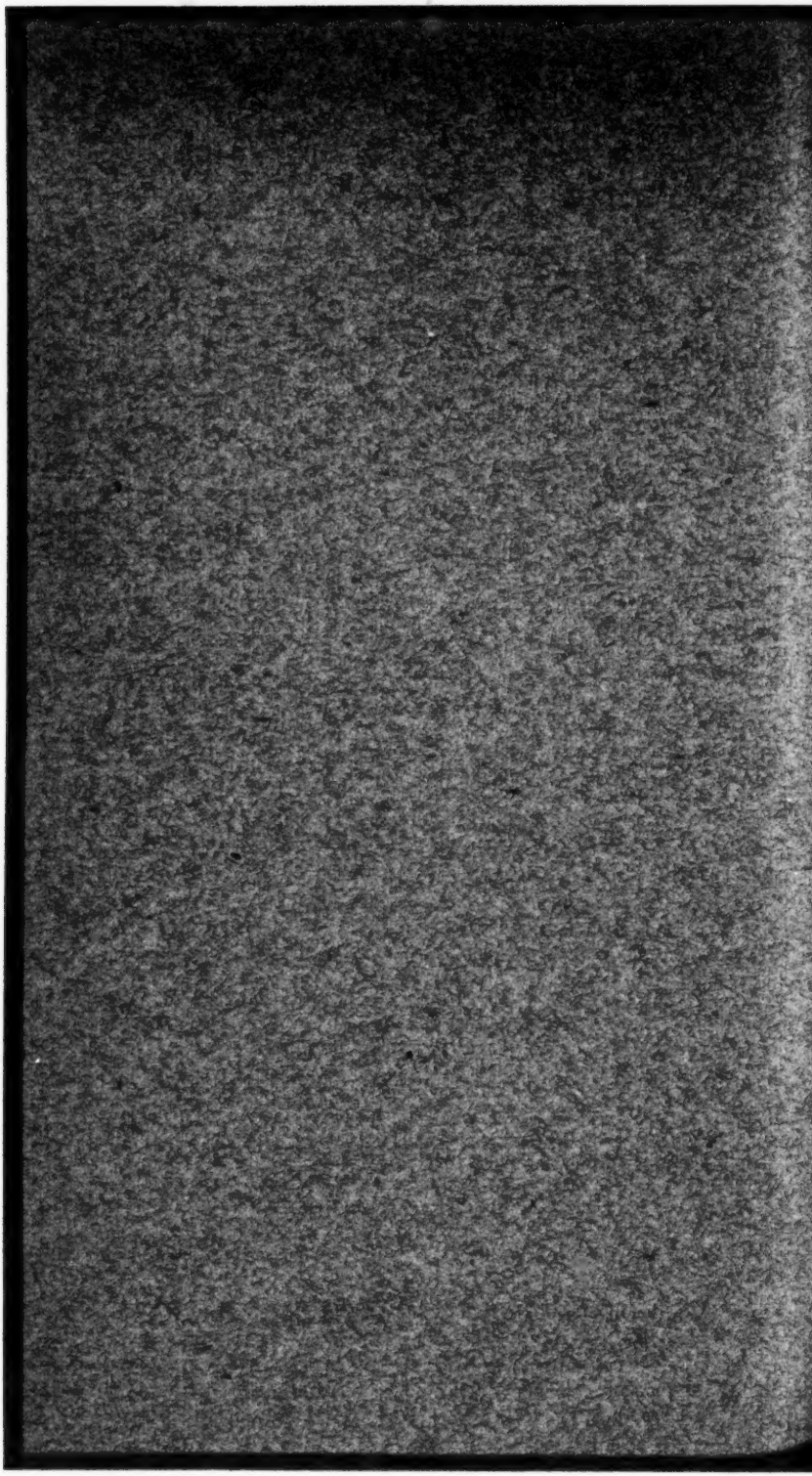
NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
LEO F. DODGE,
Defendant in Error.
No. 672.

In Error to the Springfield Court of Appeals of the State of Missouri.

STATEMENT, MOTION TO DISMISS THE WRIT OF ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI, MOTION TO AFFIRM THE JUDGMENT, BRIEFS OF THE ARGUMENTS IN SUPPORT THEREOF, AND NOTICE AND SERVICE THEREOF ON PLAINTIFF IN ERROR'S ATTORNEYS OF PRESENTATION OF THE SAME TO SAID COURT.

LOUIS H. BREUER and
JAMES J. O'DONOHOE,
Attorneys for Defendant in Error.

St. Louis Law Printing Co., Printers' Bldg., Fifth and Market. Bell, Main 3216.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

NEW YORK LIFE INSURANCE COMPANY, *Plaintiff in Error,* vs. LEO F. DODGE, *Defendant in Error.*	No. 378.

In Error to the Springfield Court of Appeals of the State of Missouri.

STATEMENT, MOTION TO DISMISS THE WRIT OF ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI, MOTION TO AFFIRM THE JUDGMENT, BRIEFS OF THE ARGUMENTS IN SUPPORT THEREOF, AND NOTICE AND SERVICE THEREOF ON PLAINTIFF IN ERROR'S ATTORNEYS OF PRESENTATION OF THE SAME TO SAID COURT.

STATEMENT OF FACTS.

This action was instituted in the Circuit Court of Phelps County, Missouri, by defendant in error against plaintiff in error, on a policy of life insurance issued by plaintiff in error on the life of Josiah B.

Dodge. The defendant in error was the wife and is now the widow of the insured and she is the designated beneficiary in said policy. The policy is a twenty-year endowment on the twenty-year accumulation plan for $5,000.00, dated the 20th day of October, 1900.

There were seven annual premiums of $263.90 each paid on said policy, thus paying the premiums until the 20th day of October, 1907, but no premium was paid thereafter. At date of lapse (20th day of October, 1907) the policy, under the Missouri non-forfeiture law, had acquired a net value of **$1,257.25**, three-fourths of which is **$942.94**.

The insured secured four loans from defendant on security of the policy. None of the proceeds of the first was applied to pay premiums; **$263.90** of the second was applied to pay premiums; **$188.25** of the third was thus applied, as well as **$215** of the fourth. The total amount applied to pay premiums is **$667.15**, which sum, deducted from **$942.94**, which represents three-fourths of the net or reserve value of the policy under the Missouri statutes, leaves a remainder of $275.79, and this remainder, taken as a net single premium for term insurance as commanded by the Missouri statute, extended the policy for five years and sixty-four days, and the insured died within the period of term insurance, for he died on the 12th day

of January, 1912; that is, he died four years, three months and twenty-three days from date of lapse.

H. G. Sellman, an actuary and witness for defendant in error (Printed Tr., pp. 14, 15), deposed:

"My name is H. G. Sellman. I am familiar with Sections 7897, 7898 and 7899 of the Revised Statutes of Missouri for 1899. I am able to make a computation of the net value of a policy on any plan under said sections and figure the extended insurance as provided by said sections. Policy in suit, photograph of which you have just shown me, is a twenty-year endowment, twenty-year accumulation plan. I am familiar with the actuaries' or combined experience table of mortality. Calculating the net value of the policy on the twenty-year endowment, twenty-year accumulation plan, according to that table, the following factors enter into the calculation: It is necessary to have the age at issue, the amount of insurance, and the period for which premiums have been paid; with this information, and by referring to the tables contained in the Principles and Practice of Life Insurance, 7th Edition, I can compute the net value of such policy. The net value of a policy for $5,000.00 on the life of a man aged thirty-six at the time of issuance, the policy being a twenty-year endowment, twenty-year accumulation policy, upon which premiums have been paid for seven years and the lapse occurs after the payment of the seven years' premiums, computed

on the actuaries' or combined experience table of mortality, with 4 per cent interest per annum, as shown on page 401 of the 7th edition of the Principles and Practice of Life Insurance, is $1,257.25; three-fourths of $1,257.25 is $942.94; $942.94 is sufficient to continue the insurance for thirteen years, to the end of the endowment period of the policy, and to purchase an additional pure endowment for $507.67. Deducting $668.05 from three-fourths of the net value of the policy at the date of lapse, or $942.94, leaves $274.89; $274.89 taken as a net single premium for temporary insurance for $5,000.00, at age forty-three, will continue such insurance in force for five years, fifty-seven and nine-tenths days. Deducting $667.15 from $942.94 leaves $275.79, and this sum taken as a net single premium for temporary insurance on a policy for $5,000.00, computed at age forty-three, on the actuaries' or combined experience table of mortality, with four per cent interest per annum, would carry such a policy five years and sixty-four days."

To the same effect is the evidence of plaintiff in error.

At the time the insured died there was only one outstanding loan on said policy, the three others having previously been discharged.

The insured made application for the policy in suit in the State of Missouri, and at that time, prior

thereto and up to his decease, he was a resident and citizen of the State of Missouri.

All applications for loans and all loan agreements were made and entered into in Missouri.

All premiums were paid to defendant in Missouri and the insured died in said state. The defendant in error (Printed Tr., pp. 13, 14) testified:

"My name is Leo Fleming Dodge; I reside in St. Louis, Missouri. I formerly lived in Sedalia, Missouri. Josiah B. Dodge, the insured under the policy in suit, was my husband. My husband died February 12, 1912; he resided in the State of Missouri. The application for the policy in suit marked 'Ballard's Exhibit A' was made in the City of St. Louis, Missouri. The signature to Ballard's Exhibit 'B' is that of Josiah B. Dodge; it was signed in St. Louis, Missouri. The policy sued on was delivered to my husband in St. Louis, Missouri. My husband signed Ballard's Exhibit 'D' in the City of St. Louis, Missouri. Ballard's Exhibit 'E', which is entitled 'Policy Loan Agreement', was signed in St. Louis, Missouri. My husband signed and cashed check marked 'Ballard's Exhibit F' at the Missouri Trust Company in St. Louis. My husband and myself signed Ballard's Exhibit 'G' in St. Louis. My husband signed the policy loan agreement dated November —, 1904, entitled Ballard's Exhibit 'H', in St. Louis, Missouri. My husband and myself signed Ballard's Exhibit 'I' in St.

Louis, Missouri. My husband cashed the check marked 'Ballard's Exhibit J' in St. Louis, Missouri. My husband signed Ballard's Exhibit 'K' in St. Louis, Missouri. My husband signed Ballard's Exhibit 'L' in St. Louis, Missouri. My husband and myself signed Ballard's Exhibits 'M' and 'N' in St. Louis, Missouri. My husband signed Ballard's Exhibit 'O' in St. Louis, Missouri. My husband and myself signed Ballard's Exhibit 'P' in St. Louis, Missouri. I saw the original of Ballard's Exhibit 'Q', which is a letter from John C. McCall, secretary, to Mr. Josiah B. Dodge. I did not make claim after my husband's death on this policy; when we received this letter from Mr. McCall because we took it for granted that everything was canceled and nothing more was due us; we relied on this letter, and we would have made claim if it had not been for this letter. I have never been in the City of New York; my husband has never been in New York. All the premiums on this policy were paid in St. Louis; all the transactions concerning policy and loans were had in Missouri; all the premiums were paid in Missouri. My husband died in Missouri."

The witnesses for plaintiff in error deposed to the same effect. The policy was delivered to the insured in Missouri and was accepted by him in writing in said state. Said acceptance (Printed Tr., pp. 20, 21) reads:

"To the New York Life Insurance Company, 346 and 348 Broadway, New York:

I hereby accept policy No. 2,054,961, which contains the following clause:

'In respect only to profits, this policy is placed in the adjustable accumulation class, and in determining the profits to be apportioned to this policy, the mortality experience of the company among persons insured in that class shall be used.'

The answer to question No. 11 in my application should be as follows: Endowment payable in twenty years with proportionate paid up.

The answer to question No. — in my application should be as follows: Date policy October 20th.

I hereby present this acceptance as an amendment to my application dated the 23rd day of August, 1900, and agree that it shall form a part of said application, the agreements in which I hereby renew and confirm.

J. B. Dodge.

Dated at St. Louis, Oct. 20th, 1900.

Witness:

G. W. Hall."

Pursuant to the command of the non-forfeiture statutes of the State of Missouri, the defendant in error gave credit in the total sum of $3,156.93, which embraced the following:

Unpaid premiums	$1,319.50
Interest compounded thereon	196.18
Outstanding loan	1,350.00
Interest thereon	291.25
Total credits	$3,156.93

The defendant in error instituted her action for the difference between the amount of the credits and the face amount of the policy, namely, $1,843.07, together with interest thereon, ten per cent damages and a reasonable attorney's fee.

The cause was tried, without a jury, on the 4th day of May, 1916, and judgment was rendered against plaintiff in error for $2,233.45, consisting of $1,983.45, being the amount due under the policy with interest at the rate of six per cent per annum from the date of suit to the date of judgment, and $250 attorney's fee. The judgment (Printed Tr., pp. 2-3) reads:

"Now, at this day, this cause coming on to be heard, plaintiff appearing in person and by counsel, and defendant by counsel, and announce ready for trial, and a jury being waived, the issues are submitted to the Court, who proceeds to hear the evidence, and, after hearing the evidence, and all the matters herein being seen, heard and by the Court fully understood, the Court doth find the issues for the plaintiff and assess her damages in the sum of nineteen hundred eighty-three and 45/100 dollars ($1,983.45),

together with an attorney fee in the sum of two hundred fifty dollars ($250.00).

It is therefore considered and adjudged by the Court that the plaintiff, Leo F. Dodge, have and recover of and from the defendant, The New York Life Insurance Company, the said sum of nineteen hundred eighty-three and 45/100 dollars damages, together with two hundred dollars attorney's fee, with interest on said sums at the rate of six per cent per annum from date hereof, together with all costs in this behalf laid out and expended and that execution issue therefor."

From this judgment the plaintiff in error duly appealed to the Springfield Court of Appeals of Missouri. Prior to the hearing in the Springfield Court of Appeals the plaintiff in error filed a motion to transfer the cause to the Supreme Court of the State of Missouri, on the grounds *(a)* that the non-forfeiture statute, Section 7897, R. S. Mo. 1899 (which, in material parts, is hereinafter set forth), was unconstitutional, and *(b)* that Section 7068, R. S. Mo. 1909, and the Amendatory Act of March 30, 1911 (Laws of Mo., 1911, pp. 282, 283), were unconstitutional.

The constitutionality of the statutes having been fully settled by the Supreme Court of Missouri and the Supreme Court of the United States, the Springfield court affirmed the judgment and overruled the motion of the plaintiff in error to transfer the cause

to the Missouri Supreme Court in an opinion (Printed Tr., pp. 71-73), which reads:

Opinion.

"The defendant company appeals from a judgment rendered against it in a suit founded on a policy of life insurance issued on October 20, 1900, on which had been paid seven annual premiums, after which the premium payments were discontinued by the assured.

Under the non-forfeiture laws of Missouri, after deducting loans which were applied to the payment of premiums from the reserve, there remained a balance of $275.79 with which to pay a single premium for term insurance and which would extend the policy for a length of time sufficient to cover the date of the death of the assured. It is uncontroverted that if merely the amount borrowed from the company, which was applied to the payment of premiums, is deducted from the reserve, the balance would purchase sufficient extended insurance to carry the risk beyond the date of the death of the assured; and it is also uncontroverted that if all the indebtedness—not only that which was applied to the payment of premiums, but an additional amount—were deducted from the reserve, there would not have been a sufficient amount to have carried the policy in force up to the date of the death of the assured.

It is argued by the appellant that Section 7897, R. S. 1899, is unconstitutional and void. This

contention must be ruled against the appellant as we held in the case of Mun v. New York Life Ins. Co., 181 S. W. 606, that the constitutionality of this statute was no longer a live question, the same having been held to be constitutional in the case of Burridge v. Insurance Co., 211 Mo. 158, *l. c.* 180, 109 S. W. 560, and other cases cited in that opinion.

Appellant raises the proposition that Section 7068, R. S. 1909, authorizing the imposition of damages and attorney fees, and the Act of March 30, 1911 (Laws 1911, p. 282), are unconstitutional and void. This contention must likewise be decided against the appellant on authority of Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903, which held that the section complained of (then Section 8012, R. S. 1899) was constitutional. (See, also, Barber v. Hartford Life Ins. Co. [Mo.], 187 S. W. 867.) The only change in that section that has been made was made in 1911 (Laws 1911, p. 282), which merely added other classes of insurance to those already named.

It is further contended that the Court erred in submitting the question of whether a penalty should be imposed for vexatiously refusing to pay the loss, because, as contended by appellant, there is no evidence justifying such submission. As to whether there was a vexatious refusal to pay has been held to be a matter of fact to be determined by the trier of the facts, the verdict in this particular to be reached by a survey of all the facts and circumstances in the case. Upon the authority of Keller v. Home Life Ins. Co., 198 Mo. 440,

l. c. 460, 95 S. W. 903; Kellogg v. German-American Ins. Co., 133 Mo. App., *l. c.* 403, 113 S. W. 663, and Brown v. Railway Passenger Assurance Co., 45 Mo., *l. c.* 227, we hold that the Court committed no error in this regard.

Lastly, it is contended by appellant that as notice of the claim was not given and proofs of death were not furnished it within ninety days after the death of the assured there can be no recovery. This question, upon evidence to the same effect as that contained in the record before us in this case, we recently decided adversely to the contention of the appellant (Mun v. New York Life Ins. Co., 181 S. W. 606).

It results that the motion to transfer this cause to the Supreme Court of this state because of a constitutional question being involved must be overruled and the judgment of the trial court affirmed. Robertson, P. J., and Sturgis, J., concur.

Jno. S. Farrington,
Judge."

The plaintiff in error presented to the Supreme Court of Missouri a petition for a writ of *mandamus* against the Judges of the Springfield Court of Appeals, which petition the Court denied.

Thereafter, upon the petition of plaintiff in error, William R. Robertson, Presiding Judge of the Springfield Court of Appeals, improvidently granted the writ of error to this Honorable Court.

The plaintiff in error, in its assignments of error, makes the following assignment:

That the Missouri non-forfeiture statute, Section 7897, Revised Statutes of Missouri, 1899, as construed by the courts of Missouri, is unconstitutional and void.

Another assignment in the assignment of errors is:

That Section 7068, R. S. Mo., 1909, and the Amendatory Act of 1911 (Laws of Missouri, 1911, page 282) are unconstitutional and void. Those relate to damages and attorney's fees. Couched in different language, the above are the only assignments of error attempting to lodge a federal question in the case as appears from the statement of points relied upon by plaintiff in error, which reads (Printed Tr., pp. 89-92):

Statement of Points Relied Upon by Plaintiff in Error.

"Please take notice that the plaintiff in error, New York Life Insurance Company, expects to rely for a reversal upon the following points:

1. Section 7897, Revised Statutes of Missouri for 1899, is unconstitutional and void and in violation of the Fourteenth Amendment to the Constitution of the United States, for the reason that said section invalidates and renders unenforceable a pledge by the insured to the insurer of the reserve of a life insurance policy to secure a loan or indebtedness where such loan or indebtedness is not for past pre-

miums on the policy, although said statute recognizes and enforces the validity of a pledge by the insured of such reserve to any other person for any indebtedness, however contracted.

2. By the judgment and decision of the Springfield Court of Appeals in this case, the said Court construes and applies Section 7897, Revised Statutes of Missouri, 1899, as invalidating the pledge by the insured to the insurer of the reserve of the policy to secure an indebtedness of the insured (other than for past premiums on the policy), while recognizing the validity of such a pledge to any other person than the insurer, and the said Springfield Court of Appeals erred in not further holding that said statute so construed and to that extent was violative of the Fourteenth Amendment to the Constitution of the United States and denied the plaintiff in error the right, privilege and immunity claimed by it under the Fourteenth Amendment to the Constitution of the United States.

3. Section 7897, Revised Statutes of Missouri, 1899, as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it denies to the plaintiff in error the equal protection of the law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

4. Section 7897, Revised Statutes of Missouri, 1899,

as construed and applied by the Springfield Court of Appeals in this case is unconstitutional and void, because it deprives the plaintiff in error of its liberty without due process of law as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

5. Section 7897, Revised Statutes of Missouri, 1899, as construed by the Springfield Court of Appeals in this case, is unconstitutional and void, because it deprives the plaintiff in error of its property without due process of law as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

6. The Springfield Court of Appeals, by its judgment in this cause, denied to the plaintiff in error a right and immunity specially set up and claimed by it under the Federal Constitution and the Fourteenth Amendment thereto, to wit, the right, privilege and immunity to contract for, take and hold in pledge a policy and its reserve thereon to secure an indebtedness due to it by the insured, on the same conditions and under the same circumstances that any other person might contract for, take and hold such pledge; and in so doing construing and applying Section 7897, Revised Statutes of Missouri, 1899, in a manner violative of the Fourteenth Amendment to the Constitution of the United States.

7. The Springfield Court of Appeals erred in hold-

ing and deciding that Section 7897, Revised Statutes of Missouri, 1899, as interpreted and applied in this case, was valid and not repugnant to the Fourteenth Amendment to the Constitution of the United States.

8. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case, was not violative of the Fourteenth Amendment to the Constitution of the United States.

9. The Springfield Court of Appeals erred in holding and deciding that Section 7897, Revised Statutes of Missouri, 1899, as construed and applied in this case, did not abridge the privileges and immunities of citizens or of the plaintiff in error as guaranteed by the Fourteenth Amendment to the Federal Constitution.

10. The Springfield Court of Appeals denied the plaintiff in error a right and immunity claimed by it under the Constitution of the United States in refusing to consider and in terms refusing to pass upon the validity, under the Constitution of the United States, of Section 7897, Revised Statutes of Missouri, 1899, and, at the same time, by its judgment, upholding and enforcing said section of said statutes, and thereby, in essence and effect, deciding that said statute was valid and not violative of the Constitution of the United States.

11. The Springfield Court of Appeals denied the

plaintiff in error a right and immunity claimed by it under the Constitution of the United States in this, that said court, by the local law and statutes of the State of Missouri, is without jurisdiction to pass upon and consider questions arising under or involving the Constitution of the United States, and, under the local law of said State of Missouri governing such court, cases involving questions arising under the Constitution of the United States are required to be transferred by said Court to the Supreme Court of the State of Missouri and to be there determined; yet, although the plaintiff in error specially set up and claimed a right and immunity under the Constitution of the United States (to wit, the right and immunity to have the contract of pledge between the insurer and the insured construed according to its terms and unaffected and uncontrolled by Section 7897, Revised Statutes of Missouri, 1899, because said statute as construed and applied in this case is violative of the Fourteenth Amendment to the Constitution of the United States), the said Springfield Court of Appeals refused, although formally requested so to do by plaintiff in error, to transfer this cause to the Supreme Court of the State of Missouri, by which said right so claimed by the plaintiff in error could be determined by the Court having jurisdiction, according to the local law governing the courts of the State of Missouri, to hear and deter-

mine such a question, and, on the contrary, the said Springfield Court of Appeals retained this cause and proceeded herein to final judgment, and, by its judgment, construed and so enforced said statute that the necessary effect of which judgment is to deny to the plaintiff in error the right, privilege and immunity under the Federal Constitution so claimed by it.

12. The judgment of the Springfield Court of Appeals of Missouri deprives the plaintiff in error of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the statute of the State of Missouri, Section 7068 of the Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof, and the construction thereof by the Court in this case and by the course of judicial construction thereof by the Courts of Missouri, authorizing the imposition of damages and attorneys' fees, permit and authorize the taking of property by pretended process of law, which is not actual process of law in that it permits the taking of private property without notice, plea, proof or an opportunity to be heard and to have a judicial inquiry before the property is adjudged to be taken, and because the condition on which said statute and the Act of March 30, 1911, in amendment thereof, say the property

may be taken, *i. e.*, 'vexatious delay,' is not required to be pleaded or proven.

13. The Springfield Court of Appeals of Missouri erred in affirming the judgment of the trial court, which included an allowance to plaintiff by way of attorneys' fees, because Section 7068, Revised Statutes of Missouri for 1909, and the Act of March 30, 1911, Laws of Missouri, 1911, page 282, in amendment thereof, which authorize the imposition by the court or jury of attorneys' fees against insurance companies for their vexatious refusal to pay the amount of policies of insurance issued by them, as construed by the Courts of Missouri, and in its application by the Springfield Court of Appeals of Missouri to the facts in this case, deprive the plaintiff in error of its property without due process of law, contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that there is no evidence in this case that the refusal of the plaintiff in error to pay to the defendant in error the amount of the policy in suit was vexatious."

Motion to Dismiss the Writ of Error for Want of Jurisdiction.

And now comes the said defendant in error and moves the Court to dismiss, with damages and costs, the writ of error herein for the reason that there is

no federal question involved in this case and because this Court is without jurisdiction in this case.

Louis H. Breuer and
James J. O'Donohoe,
Attorneys for Defendant in Error.

Motion to Affirm the Judgment of the Springfield Court of Appeals of Missouri.

And now comes the said defendant in error and moves the Court to affirm, with damages and costs, the judgment of the Springfield Court of Appeals of Missouri, herein, for the following reasons:

(1) Because it is manifest that the writ of error was taken by plaintiff in error for mere delay.

(2) Because the questions on which the decision of this cause depend are so frivolous as not to need further argument.

(3) Because it is evident on the face of the record that the questions on the merits are not open to possible contention because they have previously been specifically ruled on by this Court.

(4) Because the case is clearly governed by prior decisions of this Court.

(5) Because there is no federal question involved, the Springfield Court of Appeals of Missouri having based its decision on state questions, and state questions alone.

(6) Because the Missouri statutes in question, with the construction put upon them by the State and National Courts, entered into the consideration, and became constituent parts of the policy. In contemplation of law it is the same as if said statutes, with their construction, had been written into the face of the policy.

Louis H. Breuer and
James J. O'Donohoe,
Attorneys for Defendant in Error.

BRIEF OF THE ARGUMENT ON MOTION TO DISMISS.

I.

Section 7897, Revised Statutes of Missouri, 1899, is the one plaintiff in error contends is unconstitutional and invalid.

This section, in material parts, reads:

> "No policies of insurance on life hereafter issued * * * shall, after payment upon it of three annual payments, be forfeited or become void by reason of non-payment of premiums thereof, but * * * the net value of the policy, when the premium becomes due and is not paid, shall be computed upon the Actuaries' or Combined Experience Table of Mortality, with four per cent interest per annum, **and after deducting from three-fourths of such net value any notes or other evidence** of indebtedness to the company, **given on account of past premium payments on said policies issued to the insured,** which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy."

The question here involved is clearly and concisely stated and disposed of by the Springfield Court of Appeals, as follows:

"Under the non-forfeiture laws of Missouri, after deducting loans which were applied to the payment of premiums from the reserve, there remained a balance of $275.79 with which to pay a single premium for term insurance and which would extend the policy for a length of time sufficient to cover the date of the death of the assured. It is uncontroverted that if merely the amount borrowed from the company, which was applied to the payment of premiums, is deducted from the reserve the balance would purchase sufficient extended insurance to carry the risk beyond the date of the death of the assured; and it is also uncontroverted that if all of the indebtedness—not only that which was applied to the payment of premiums, but an additional amount were deducted from the reserve, there would not have been a sufficient amount to have carried the policy in force up to the date of the death of the assured. It is argued by the appellant that Section 7897, R. S. 1899, is unconstitutional and void. This contention must be ruled against the appellant as we held in the case of Mun v. New York Life Ins. Co., 181 S. W. 606, that the constitutionality of this statute was no longer a live question, the same having been held to be constitutional in the case of Burridge v. Insurance Co., 211 Mo. 158, l. c. 180, 109 S. W. 560, and other cases cited in that opinion" (Printed Tr., pp. 71-72).

Section 5983, Revised Statutes of Missouri, 1879, corresponds to Section 7897, R. S. Mo. 1899, and is,

so far as this controversy is concerned, substantially the same, and the Supreme Court of Missouri (*In Banc*), in Cravens v. New York Life Insurance Co., 148 Mo. 583, decided that said section was constitutional and valid. And it was there adjudged that:

> "Foreign insurance companies which do business in this State, do so not by right, but by grace, and must in doing so conform to its laws. Moreover, the State may prescribe conditions upon which it will permit such companies to transact business within its borders or exclude them altogether, and in so doing violate no contractual rights of the company."

It was further adjudged that:

> "A statute with respect to the subject matter in force at the time the contract is entered into within the state becomes a part of the contract, as much so as if copied into it."

It was also adjudged that:

> "When no statute intervenes prohibiting it, a corporation doing business by permission in another state than that of its incorporation may by contract make the law of the state of its incorporation the applicatory law of the contract, but where the laws of the state in which it does business by license prohibit such corporation from making certain kinds of contracts, it can act only in accordance therewith."

And the plaintiff in error here, having been held liable on the policy in that case, it was removed to the Supreme Court of the United States.

And this court, in its opinion, affirmed the judgment of the Missouri Supreme Court and approved every proposition there decided, and wrote, furthermore, that:

> **"If we are bound by the interpretation of the statute we need not review the reasoning by which that interpretation was reached, and we think we are bound by it"** (New York Life Ins. Co. v. Cravens, 178 U. S. 389).

The plaintiff in error attacked as unconstitutional Section 5856, R. S. Mo. 1889, which corresponds to Section 7897, R. S. Mo. 1899 (the latter being the one now in question), but the Missouri Supreme Court (*in banc*) decided that said section was constitutional, and, in part, wrote:

> "All the questions of law involved in this case have been very recently considered by this Court in Cravens v. New York Life Insurance Company, 148 Mo. 583, and as we are entirely satisfied that the law was properly declared in that case, we deem it unnecessary to review those questions now" (Horton v. New York Life Insurance Co., 151 Mo., *l. c.* 615-616).

This case also found its way to the Supreme Court

of the United States, but was dismissed by plaintiff in error on the 29th day of October, 1900, because of the decision of the Supreme Court of the United States in the Cravens case (New York Life Ins. Co. v. Horton, Mem. 21 Sup. Ct. Rep. 917). The Cravens and Horton cases were decided before the policy in suit was issued, and hence said decisions entered into and became constituent parts thereof, and that, too, as much so as if copied therein. The unpaid loan in the case at bar was made in Missouri on the 9th day of November, 1906, and it was prior to that time (March 20, 1903) that the Missouri Supreme Court, *in banc*, decided the parallel loan case of Smith v. Mutual Ben. Life Ins. Co., 173 Mo. 329. Hence, a change of decision affecting the rights of the defendant in error would be an impairment of contract within the meaning of the State and National Constitutions.

Thus in Louisiana v. Pilsbury, 105 U. S., *l. c.* pp. 294, 295, the Court said:

> "The decisions upon the clause of the Constitution of 1852 are corroborative of the correctness of the construction originally placed upon the clause of the Constitution of 1845. Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. Their

validity can not be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much so as if embodied in it.

So far does the doctrine extend that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it."

Here the Court cited: Christy v. Pridgeon, 4 Wall. 196, and Shelby v. Guy, 11 Wheat. 361, and continued:

"The statute as thus expounded determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts."

In Douglass v. County of Pike, 101 U. S., *l. c.* 687, the Court wrote:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and pur-

poses the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

To the same effect is Burgess v. Seligman, 107 U. S. 20.

We think the first time that the plaintiff in error contended that the particular section as found in the Revision of 1899, namely, Section 7897, R. S. Mo. 1899, was unconstitutional and void was in the all fours loan case of Burridge v. New York Life Insurance Co., 211 Mo. 158. In that case, at pages 180, 181, the Court wrote:

"But defendant's learned counsel contend in effect that if we should hold the case at bar is controlled by the Smith case, then there is left to them the proposition that our statute as interpreted by that case is unconstitutional as an impairment of the right of contract. They put their finger on certain provisions in both the Federal and State Constitutions (to wit, the Fourteenth Amendment to the Constitution of the United States and Section 4, Article II, of the Constitution of Missouri), which they say present an impassable barrier to the passage of such a law. We are not impressed with the soundness of this proposition. The defendant company had no right to do business in Missouri except by permission of the laws of this commonwealth and under such constitutional conditions as those laws imposed.

Knowing the law, it applied for and received permission to come into Missouri and make insurance contracts. When the contract in suit was entered into 1894 there was a limitation put upon the right to make it. By that limitation defendant could only write contracts of a certain character, to wit, policies not subject to forfeiture on certain contingencies and subject to have their net value applied to the purchase of temporary insurance after deducting loans of a specified character and no other. That statute was impliedly accepted by defendant when it accepted its license to do business.

"The defendant was not bound to come into the State of Missouri and write contracts of insurance attended with results indicated by the statute under consideration. That is not the question. Defendant did come in and did write insurance under the law (Whitfield v. Ins. Co., 205 U. S., l. c. 495). It took its right to write insurance cum onere—the bitter with the sweet (New York Life Ins. Co. v. Cravens, 178 U. S. 389, s. c. 148 Mo. 583; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246; Waters-Pierce Oil Co. v. State of Texas, 177 U. S. 28; Daggs v. Orient Ins. Co., 136 Mo. 382, s. c. 178 U. S., l. c. 566; State ex inf. v. Standard Oil Co., 194 Mo., l. c. 148, 149). We rule the point against the defendant."

The same section (Sec. 7897, R. S. Mo. 1899) was construed by the Springfield Court of Appeals in the case of Christensen v. New York Life Insurance Co.,

152 Mo. App. 551. The facts in that case are almost identical to the facts in the instant case, and it was held there, as it was held in the instant case, that, because of the command of the statute, the company could not deduct the loan from the net value of the policy in computing the extended insurance, since said loan was not made for the purpose of paying premiums. The same ruling, in the same case, was made by the St. Louis Court of Appeals (Christensen v. New York Life Insurance Co., 160 Mo. App. 486).

The Springfield Court of Appeals made the same ruling in the similar loan case of Gillen v. New York Life Insurance Company, 178 Mo. App. 89. The loan was not allowed to be deducted from the net value of the policy. The Court held that Section 7897, R. S. Mo. 1899, being the section here attacked, was the supreme law of the policy and affirmed the judgment for plaintiff.

Speaking of the particular section here involved, the Springfield Court of Appeals in the parallel loan case of Mun v. New York Life Insurance Co., 181 Southwestern, *l. c.* 609, in part said:

> "As to the question of this court having no jurisdiction because the non-forfeiture statute is assailed as being unconstitutional, we think such question is no longer a live one, and that is as far as we are allowed to go in disposing of the constitutional questions.

This statute was held constitutional in Cravens v. Ins. Co., 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628, which was affirmed by the United States Supreme Court in 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116."

Then, again, the Court said:

"The constitutionality of this statute having been fully settled by the Supreme Court, the same is now a dead question and without sufficient vitality to work a transfer of this case to the Supreme Court." (Cases cited.)

The plaintiff in error here made application for a writ of *certiorari* in that case to the Supreme Court of Missouri, but the same was denied.

Other Missouri loan cases involving the section here attacked and in each of which the facts were almost exact counterparts to the facts in the case at bar are: Smith v. Mutual Benefit Life Ins. Co., 173 Mo. 329 (a decision by the Missouri Supreme Court, *in banc*, March 20, 1903); Liebing v. Mutual Life Ins. Co., 269 Mo. 509 (a decision by Division No. 1 of the Missouri Supreme Court, Jan. 20, 1916); Paschedag v. Metropolitan Life Ins. Co., 155 Mo. App. 185 (a decision by the St. Louis Court of Appeals, Jan. 24, 1911); Crowe v. Bankers' Life Ins. Co., 190 S. W. 960 (a decision by the Kansas City Court of Appeals, Dec. 18, 1916).

That Section 7897, R. S. Mo. 1899, is constitutional and that loans not applied to pay premiums are not deductible from the net or reserve value of Missouri policies issued before the amendatory act of 1903 (Laws 1903, p. 208) are propositions, we submit, not now fairly debatable. The plaintiff in error knew the same when it refused payment in this case, for it had figured as a litigant in more parallel loan cases than all the other insurance companies.

Indeed, out of the large number of foreign insurance companies carrying on insurance business in Missouri, only in four cases have they figured; and none of the four has appeared in court challenging the statute a second time.

We are bound to say, to the credit of the Missouri insurance companies, that not one of them has been in court in a single case challenging the validity of the non-forfeiture statutes, though said statutes apply alike to domestic and foreign insurance companies.

We pass this question with the observations *(a)* that the Missouri non-forfeiture statutes do not require the insurance companies to make loans at all. They only command that three-fourths of the reserve, less loans made to pay premiums, shall be applied to purchase extended insurance. In other words, no part of the reserve can be appropriated to repay outright loans; *(b)* other sections of the Missouri insurance

statutes have been pronounced constitutional and valid. Instances are: The suicide statute (Whitfield v. Ins. Co., 205 U. S. 489); the valued policy statute (Ins. Co. v. Daggs, 172 U. S. 557); the Missouri misrepresentation statute (Ins. Co. v. Riggs, 203 U. S. 243).

II.

The other assignment in the assignment of errors by plaintiff in error is that Section 7068, R. S. Mo. 1909, and the amendatory act of 1911 are unconstitutional.

This section (7068 R. S. Mo. 1909) reads:

> "In any action against any insurance company to recover the amount of any loss under a policy of fire, life, marine or other insurance, if it appear from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not exceeding 10 per cent on the amount of the loss and a reasonable attorney's fee; and the Court shall enter judgment for the aggregate sum found in the verdict."

The amendatory act of 1911 merely embraces other forms of insurance. The amendments are:

> "That Section 7068 of the 1909 Revised Statutes of Missouri be and the same is hereby

amended by adding thereto, between the words 'fire' and 'life' in the third line of said section, the words, 'cyclone, lightning', and between the said word 'life' and the word 'marine' in the said line the words 'health, accident, employers' liability, burglary, theft, embezzlement, fidelity, indemnity', so that said section as amended reads as follows:"

Then follows the section as amended (Laws of Mo. 1911, pp. 282-283).

If the question were important we should suggest that said amendatory act is inapplicable in this case, since the policy in suit was issued before its passage (Knights Templer, Etc., v. Jarman, 187 U. S. 197).

An allowance of 10 per cent damages for vexatious delay in paying a policy was affirmed in the early case of Reife v. Wilson, 131 U. S. Appx. clxxxix, under Sec. 1, Chap. 90, R. S. Mo. 1865.

Section 8012, R. S. Mo. 1899, is in the same words as the section in question, namely, Section 7068, R. S. Mo. 1909, and the Supreme Court of Missouri, in Keller v. Home Life Ins. Co., 198 Mo. 440, decided that said section was constitutional, upon the authority of Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308, and Iowa Life Ins. Co. v. Lewis, 187 U. S. 335. The Court, in part, said:

"The lawmaking power in the enactment of the Texas statute, as well as the Missouri Gen-

eral Assembly in the enactment of the statute in the case at bar, doubtless, as was said in the Mettler case, **'had in mind also the necessity of the prompt payment of the insurance money, in very many cases, in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured.'** We are of the opinion that the Mettler case clearly and correctly announced the true rule applicable to the Texas statute, and the rules announced in that case being equally applicable to the Missouri statute treating of the same subject, **it becomes our duty to follow that case;** hence it must be held that section 8012 is a valid and subsisting law, and may be enforced by the courts of this State; and there was no error in giving instruction number 2 on that ground" (*l. c.* 460).

The Missouri statute was held constitutional in the case of Williamson v. Liverpool L. & G. Ins. Co., 141 Fed. 54, upon the authority of the Mettler and Lewis cases, and Farmers, Etc., Ins. Co. v. Dobney, 189 U. S. 301.

The Supreme Court of Missouri on the 30th day of March, 1916, decided the case of Barber v. Ins. Co., 269 Mo. 21. The decision commences with the following words and figures, namely:

"The defendant pleaded in its answer that the provision of Section 7068 of the Revised Statutes of Missouri, 1909, was unconstitutional and void

and therefore could not be made the basis of any recovery for damages and attorney's fees in this suit. This claim has been rejected by this Court and the Supreme Court of the United States until it has become too stale to serve as a foundation for our jurisdiction."

Here the Court cited:

Keller v. Ins. Co., 198 Mo. 440; Ins. Co. v. Mettler, 185 U. S. 308; Ins. Co. v. Lewis, 187 U. S. 335; Ins. Co. v. Dobney, 189 U. S. 301; Fraternal Mystic Circle v. Snyder, 227 U. S. 497, and continued:

> **"It is probably, in view of these repeated decisions and others to the same effect, that the appellant has not favored us with a brief or argument on this point"** (*loc. cit.*, p. 33).

To the same effect are the cases of M. K. & T. Ry. v. Cade, 233 U. S. 642, and Seaboard Air Line v. Seegers, 207 U. S. 73.

And in Manhattan Life Ins. Co. v. Cohen, 234 U. S., *l. c.*, pp. 133, 134, the Court said:

> **"At the threshold we must dispose of a motion to dismiss. It is apparent from the statement of the case that the only express assertion of Federal right had reference to the statutory penalty and the attorney's fee."**

The concluding paragraph of the opinion (page 137) reads:

"As the repugnancy of the statute concerning the damages and attorney's fee was the only semblance of ground for invoking our jurisdiction and as that ground was conclusively established to be without merit when the writ of error was sued out, it follows that there is nothing upon which to base jurisdiction and the writ of error must be dismissed. Dismissed for want of jurisdiction."

It has been decided repeatedly by this Court that, where, as here, no Federal question has been passed upon by the State Court, the writ of error should be dismissed (White v. Leovy, 174 U. S. 91; Remington Paper Co. v. Watson, 173 U. S. 443; Castillo v. McConnico, 168 U. S. 674; Eustis v. Bolles, 150 U. S. 361; Walson v. Nevin, 128 U. S. 578). So, too, a motion to dismiss will be sustained where, as here, the case is governed by a prior decision of this Court (The Alaska, 130 U. S. 201; Micas v. Williams, 104 U. S. 556; Palmer v. Hussey, 119 U. S. 96; Barrington v. Missouri, 205 U. S. 483).

It is elemental that where, as here, the Federal question upon which the jurisdiction of the United States Supreme Court on the writ of error to the State Court is based grows out of an alleged impairment of the obligations of the contract by the decision of the State Court and not by a subsequently enacted statute of the State Legislature, such alleged impair-

ment is not within the meaning of the National Constitution, does not confer jurisdiction on the United States Supreme Court, and accordingly the writ of error in such cases should, we think, be dismissed.

BRIEF OF THE ARGUMENT ON MOTION TO AFFIRM.

I.

Should the motion to dismiss be overruled, then we maintain that the motion to affirm should be sustained. And to avoid repetition, we respectfully ask that what we have said on the motion to dismiss be taken as applying to the motion to affirm.

The judgment should be affirmed under clause 5 of rule 6 of the rules of this court (Micas v. Williams, 104 U. S. 556; The Alaska, 130 U. S. 201; Chanute City v. Trader, 132 U. S. 210; Blythe v. Hinckey, 180 U. S. 333; Equitable Life Assurance Society v. Brown, 187 U. S. 308; Bergdoll v. Harrigan, Trustee, Etc., 238 U. S. 609). The assignments of error on the merits are unquestionably frivolous and it is obvious that the writ of error was taken for mere vexation and delay.

It is evident, too, on the face of the record, that the questions on the merits are not now open to review, since they have formerly been so definitely

and adversely ruled on by this Court as to foreclose further controversy on the subjects.

Indeed, the Springfield Court of Appeals based its decision on state questions only, and hence there is no Federal question involved and none for this Court to decide. Accordingly, we confidently look to this Honorable Court to dismiss the writ of error for want of jurisdiction, with damages and costs, or affirm the judgment, with damages and costs.

Respectfully submitted,

LOUIS H. BREUER and
JAMES J. O'DONOHOE,
Attorneys for Defendant in Error.

To Messrs. James C. Jones, Lon O. Hocker, Frank H. Sullivan, Eugene H. Angert, James C. Jones, Jr., and James H. McIntosh, Attorneys for the Plaintiff in Error, New York Life Insurance Company:

Please take notice that the foregoing motion to dismiss the writ of error in said cause for want of jurisdiction, as well as the foregoing motion to affirm the judgment, together with the foregoing statement of facts and briefs of the arguments in support of said motions, together with this notice, will be presented to the Supreme Court of the United States, in open session, on Monday, the twenty-ninth day of October, 1917, and said cause will be submitted to said

Court on said motions, statements and briefs, at that time, at the opening of said Court or as soon thereafter as counsel can be heard.

LOUIS H. BREUER and
JAMES J. O'DONOHOE,
Attorneys for Defendant in Error.

Received a copy of the foregoing statement, motion to dismiss said writ of error, motion to affirm the judgment and briefs of the arguments in support thereof, together with a copy of the foregoing notice this 29th day of August, 1917.

James H. McClintock
James C. Jones
Lon O. Hocker
(Copy) Frank H Sullivan
Eugene H August
James C. Jones Jr

Attorneys for Plaintiff in Error.

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Applegate v. Ins. Co., 153 Mo. App. 63.....12 and 42
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Con. Laws of New York, Vol. III, p. 1714, Sec. 58 ..... 10, 39
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Louisiana v. Pilsbury, 105 U. S. 278..... 11
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Tetley v. McElmurry, 201 Mo., *l. c.* 394..... 16
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Wall v. Travis Co., 174 U. S. 499..... 11
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 378.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

LEO F. DODGE,
Defendant in Error.

In Error to the Springfield (Missouri) Court of Appeals.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

We first call attention to our motions to dismiss the writ of error or affirm the judgment herein with statement and brief, which are also submitted.

This action was instituted in the Circuit Court of Phelps County, Missouri, by defendant in error against plaintiff in error, on a policy of life insurance issued by plaintiff in error on the life of Josiah B. Dodge.

The defendant in error was the wife and is now the widow of the insured and also the named beneficiary in said policy.

The policy was a twenty-year endowment policy on the twenty-year accumulation plan for $5,000.00. The quarter annual premium was $69.95. Paid annually, it was $15.90 annually less, for the annual premium was $263.90. The insured made application for the policy in the City of St. Louis, Missouri, and said policy was delivered to him in said city and state. The premiums were all paid in St. Louis, and the insured died in said city on the 12th day of February, 1912.

There were seven annual premiums of $263.90 each paid on said policy, thus paying the premiums until the 20th day of October, 1907, but no premium was paid thereafter. At date of lapse (20th day of October, 1907) the policy, under the Missouri non-forfeiture law, had acquired a net value of **$1,257.25**, three-fourths of which is **$942.94.**

The insured secured four loans from defendant on security of the policy. None of the proceeds of the first loan was applied to pay premiums; **$263.90** of the second was applied to pay premiums; **$188.25** of the third was thus applied, as well as **$215**, of the fourth. The total amount applied to pay premiums is **$667.15**, which sum, deducted from **$942.94**, which represents three-fourths of the net or reserve value of the policy under the Missouri statutes, leaves a remainder of $275.79, and this remainder, taken as a net single premium for term insurance, extended the policy for "**five** years and **sixty-four** days" (Trans., p. 15).

The insured died within the term insurance period,

for he died on the **12th day of January, 1912.** From the date of lapse (October 20, 1907) to the date of death (February 12, 1912) is **four years, three months and twenty-three days.**

Some time prior to the 17th day of December, 1907, the defendant appropriated the reserve value of the policy to repay the outstanding loan and pronounced the policy of "**no further value**", which was not true.

This information was conveyed to the insured by letter from defendant dated the 17th day of December, 1907 (Trans., p. 42).

The plaintiff relied on said letter and because of it she failed to make prompt claim under the policy (Trans., p. 14).

At the time the insured died there was only one outstanding loan on said policy, the three others having previously been discharged. The insured made application for the policy in suit in the State of Missouri, and at that time, prior thereto and up to his decease, he was a resident and citizen of the State of Missouri.

All applications for loans and all loan agreements were made and entered into in Missouri, and all premiums were paid to plaintiff in error in said state.

Pursuant to the command of the non-forfeiture statutes of Missouri, the defendant in error gave credit in the total sum of $3,156.93, as follows:

Unpaid premiums	$1,319.50
Interest compounded thereon	196.18
Outstanding loan	1,350.00
Interest thereon	291.25
Total credits	$3,156.93

The defendant in error instituted her action for the difference between the amount of the credits and the face amount of the policy, namely, $1,843.07, together with interest thereon, damages and attorney's fee.

The cause was tried, without a jury, on the 4th day of May, 1916, resulting in a judgment for defendant in error, from which judgment plaintiff in error duly appealed to the Springfield Court of Appeals of Missouri. Prior to the hearing in the Springfield Court of Appeals the plaintiff in error filed a motion to transfer the cause to the Supreme Court of Missouri, on grounds, among others, that the non-forfeiture statute, Sec. 7897, R. S. Mo. 1899 (which we shall hereinafter fully set forth) was unconstitutional.

The constitutionality of the statutes attacked having been fully settled by the Supreme Court of Missouri and the Supreme Court of the United States, the Springfield Court of Appeals affirmed the judgment and overruled the motion of the plaintiff in error to transfer the cause to the Missouri Supreme Court in an opinion set forth on pages 71-73 of the transcript.

Thereafter, the plaintiff in error presented to the Supreme Court of Missouri a petition for a writ of *mandamus* against the judges of the Springfield Court of Appeals, which petition the Court denied. But thereafter, upon petition of plaintiff in error, Hon. William R. Robertson, Presiding Judge of the Springfield Court of Appeals, improvidently granted a writ of error to this Honorable Court.

Thereafter, the defendant in error filed motions to dismiss the writ of error or affirm the judgment, and the cause was set on the summary docket. At the time the policy in suit was issued the following,

among other Missouri insurance statutes, were in force, being sections 7897 and 7899 of Vol. II of the Revised Statutes of Missouri of 1899, pp. 1842-1843, namely:

"Sec. 7897. **Policies Non-Forfeitable, When.**— No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of three annual payments, be forfeited or become void, by reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent interest per annum, **and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy**; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but, if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so

much as said premium will purchase, determined by the age of the insured at date of default in the payment of premiums on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of original term of endowment, if the insured shall then be alive."

"Sec. 7899. **Rule of Payment on Commuted Policy.**—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 7897, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: **Provided, however,** that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; **and provided also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.**"

These statutes were originally enacted in 1879 (Secs. 5983-5985, R. S. Mo. 1879) and the same sections were continued in force in the R. S. Mo. 1899 (Secs. 7897-7899) and said sections were continued in force (with the amendatory act, 1903, Laws 1903, p.

208) incorporated therein, in R. S. Mo. 1909 (Secs. 6946-6948, R. S. Mo. 1909).

Our corporation laws in force when plaintiff in error obtained its license to do business in Missouri provides that every foreign corporation doing business in that state shall have and maintain a public office therein for the transaction of its business, and said section contains specifically the following language:

> "And such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers" (Sec. 1024, Vol. I, p. 337, R. S. Mo. 1899).

Hence the above quoted sections were as binding on plaintiff in error as on domestic insurance companies; and no local insurance company has complained or attacked said sections.

The fact that defendant in error did not bring her action earlier is accounted for by McCall's letter (Trans., p. 42), she so testified (Trans., p. 14).

BRIEF OF THE ARGUMENT.

I.

The insured made application for the policy in suit in the State of Missouri. It was delivered to and accepted by him in said state. The premiums were all paid in Missouri, and the insured died in said state. Hence, the Missouri non-forfeiture statute, section 7897, Revised Statutes of Missouri 1899, became a part of said policy as much so as if copied therein.

Cravens v. Ins., Co., 148 Mo. 583;
Ins. Co. v. Cravens, 178 U. S. 389;
Equitable Life v. Clements, 140 U. S. 226;
Whitfield v. Ins. Co., 205 U. S. 489;
Ins. Co. v. Daggs, 172 U. S. 557;
Lukens v. Insurance Co., 269 Mo. 575.

II.

The loan agreement was made in Missouri; and, moreover, it is not a contract independent of the policy.

Smith v. Ins. Co., 173 Mo. 329;
Burridge v. Ins. Co., 211 Mo. 158;
Christensen v. Ins. Co., 152 Mo. App. 551;
Paschedag v. Ins. Co., 155 Mo. App. 185;
Gillen v. Ins. Co., 178 Mo. App. 89;
Mun v. Ins. Co., 181 S. W. (Mo. App.) 606;
Crowe v. Ins. Co., 190 S. W. (Mo. App.) 960;
McCall v. Ins. Co., 193 S. W. (Mo. App.) 860;
McKinney v. Ins. Co., 270 Mo. 305;
Dannehauser v. Wallenstein, 169 N. Y. 199;
McDonnell v. Ins. Co., 85 Ala. 412.

III.

The Missouri statute permitting insurance companies to make the laws of the state of their incorporation controlling in reference to cash-surrender, paid-up and extended insurance values was enacted in 1895 (Laws, 1895, pp. 197-8), and while this statute was in force the policies were issued in the cases of Epperson v. Ins. Co., 90 Mo. App. 432, and Nichols v. Ins. Co., 176 Mo. 355. Prior to that time the insurance companies could not make the laws of their incorporation applicable. (Price v. Ins. Co., 48 Mo. App. 283; Knapp v. Ins. Co., 117 U. S. 414).

In 1899 (Laws 1899, p. 248) the right to make the laws of the home state applicable with respect to the above-named values was stricken out and section 5859, R. S. Mo. 1889, in force when the policy was issued in Cravens v. Ins. Co., 148 Mo. 583, 178 U. S. 389, was re-enacted. This section is the corresponding one to Sec. 7900, R. S. 1899, and Sec. 6949, R. S. Mo. 1909, and is in the same words. At the time the policy in the instant case was issued the insurer could not make the laws of its home state applicable either by the policy, application or loan agreement (Whittaker v. Ins. Co. 133 Mo. App. 664—cases cited).

The insurer in the case at bar did not attempt to make, by policy stipulations, the laws of New York the applicatory laws, but did attempt to do so by the application.

This could not be done for the further reason that said application is no part of the policy, because it is neither attached to said policy nor endorsed thereon as required by Sec. 7929, R. S. Mo. 1899. The applications were held no part of the policies in Schuler

v. Metropolitan Life, 191 Mo. App. 52, and Coscarella v. Metropolitan Life, 175 Mo. App. 130.

The New York law on this subject is in all respects similar to the laws of Missouri (Con. Laws of N. Y., Vol. III, p. 1714, Sec. 58; Becker v. Ins. Co., 153 A. D. (N. Y. 1912) 382, S. C. 138 N. Y. Supp. 491; Murphy v. Ins. Co., 83 Misc. 475).

Neither is the policy loan agreement a part of the policy because it is not indorsed on the policy, set forth therein nor attached thereto (Miller v. Ins. Co., 168 Mo. App. 320; McCarthy v. Ins. Co., 46 Nat. Corp. Rep. 287; Snyder v. Ins. Co., 13 Wend. [N. Y.] 92; Joyce [2nd Ed.], Secs. 191-198 of Vol. I, and cases there cited).

IV.

Section 7897, R. S. Mo. 1899, commands that three-fourths of the reserve value, less notes or other evidence of indebtedness, shall be taken as a net single premium for temporary insurance for the full amount written in the policy. No other evidence of indebtedness is deductible on policies issued from 1879 to the passage of the Amendatory Act of 1903 (Laws 1903, p. 208).

Smith v. Ins. Co., 173 Mo. 329;
Burridge v. Ins. Co., 211 Mo. 158;
Christensen v. Ins. Co., 152 Mo. App. 551;
Paschedag v. Ins. Co., 155 Mo. App. 185;
Christensen v. Ins. Co., 160 Mo. App. 486;
Gillen v. Ins. Co., 178 Mo. App. 89;
Mun v. Ins. Co., 181 S. W. (Mo. App.) 606;
Crowe v. Ins. Co., 190 S. W. (Mo. App.) 960;
Liebing v. Ins. Co., 269 Mo. 509.

This statute has been held constitutional in the following cases:

Cravens v. Ins. Co., 148 Mo. 583;
Ins. Co. v. Cravens, 178 U. S. 389;
Horton v. Ins. Co., 151 Mo. 604;
Burridge v. Ins. Co., 211 Mo. 403.

The constitutionality of said statute **"is now a dead question."**

Mun v. Ins. Co., 181 S. W., *l. c.* 609 (and cases there cited);
Turner v. Land & Timber Co., 259 Mo. 15;
Schmidt v. United Order of Foresters, 259 Mo. 491;
Dennis v. Modern Brotherhood of America, 231 Mo. 211.

V.

The judicial construction of a statute in prior cases enters into and becomes a part of the contract. Hence, the cases of Cravens v. New York Life, 148 Mo. 583, s. c. 178 U. S. 389, and Horton v. New York Life, 151 Mo. 604, became constituent elements of the policy in suit and constituted a part of the consideration for entering into the contract; and a decision now holding the non-forfeiture statute unconstitutional to affect the policy in question would be an impairment of contract within the meaning of the State and National Constitutions.

Wall v. Travis Co., 174 U. S. 499;
Douglas v. County of Pike, 101 U. S. 677;
Louisiana v. Pilsbury, 105 U. S. 278;
Lowenstein v. Casualty Co., 88 Fed., *l. c.* 478;
Casualty Co. v. Waterman, 161 Ill. 636;
Collier v. Life Ass'n, 119 Fed. 617;

Burgess v. Seligman, 107 U. S. 20;
Gelpicke *et al.* v. The City of Dubuque, 1 Wall. 175;
Havemeyer v. Iowa Co., 3 Wall 294;
Mitchell v. Burlington, 4 Wall 270;
Schmidt v. Foresters, 228 Mo., *l. c.* 698;
Wilkes Co. v. Coler, 180 U. S. 506;
Loeb v. Columbia Twp., 179 U. S. 472;
Stanley Co. v. Coler, 190 U. S. 437.

VI.

The liberty clause of the National Constitution refers to natural, not artificial, persons.

Ins. Co. v. Riggs, 203 U. S. 243;
Applegate v. Ins. Co., 153 Mo. App. 63.

VII.

The Legislature of the state has the power to pass laws prescribing rules by which foreign insurance companies may do business in this state. The plaintiff in error's viewpoint to the effect that it may make contracts and divert the reserve value of policies in defiance of the statutes as construed by the Appellate Courts is erroneous. Indeed, the Legislature has the power to pass laws prohibiting altogether foreign insurance companies from doing business in this state.

Ins. Co. v. Cravens, 178 U. S. 389;
Paul v. Virginia, 8 Wall 168;
Villa v. Rodriguez, 12 Wall 338;
Hooper v. California, 155 U. S. 648;
Holden v. Hardy, 169 U. S. 366;
Ins. Co. v. Daggs, 172 U. S. 557.

VIII.

That the Missouri courts had jurisdiction in this case is not open to debate. And the fact that the Court did not render such a judgment as would meet the approval of plaintiff in error is no violation of the due process of law clause of the Fourteenth Amendment.

Enterprise Irig. Dist. v. Canal Co., 243 U. S. 157;
Ins. Co. v. Warren, 181 U. S. 73;
Kenwood v. La., 92 U. S. 480;
Davidson v. New Orleans, 96 U. S. 97;
Head v. Mfg. Co., 113 U. S. 9;
R. R. Tax Cases, 115 U. S. 321;
Morrow v. Brinkley, 129 U. S. 178;
Morley v. Ry. Co., 146 U. S. 162;
Traction Co. v. Ry. Co., 151 U. S. 137;
Marchant v. Ry. Co., 153 U. S. 380;
Bergeman v. Backer, 157 U. S. 655;
Land Co., v. Laidley, 159 U. S. 103;
Castillo v. McConnico, 168 U. S. 674;
Lynde v. Lynde, 181 U. S. 183;
R. R. Co. v. Schmidt, 177 U. S. 230;
Arrowsmith v. Harmoning, 118 U. S. 194;
Fayerweather *et al.* v. Ritch *et al.*, 91 Fed. Rep. 721.

IX.

Laws relating solely to a subject, such as laws affecting building and loan associations, pawn brokers, railway companies, insurance companies and the like, in no manner violate the equal protection of the laws clause of the Constitution.

Ins. Co. v. Daggs, 172 U. S. 557;
R. R. Co. v. Matthews, 174 U. S. 96;
Ins. Co. v. O'Shea, 244 U. S. 325.

X.

When the plaintiff in error issued the policy in suit it knew its rights, liberties and obligations thereunder, for section 7897, R. S. Mo. 1899, was enacted and the cases of Cravens v. Ins. Co., 178 U. S. 389, and Horton v. Ins. Co., 151 Mo. 604, were decided prior thereto.

The Missouri non-forfeiture statute was enacted in 1879. In these circumstances the plaintiff in error is not at liberty to invoke the Constitution as a defense herein.

Sevier v. Haskell, 14 Wall 12;
Bacon v. Texas, 163 U. S. 207;
Turner v. Co. Commissioners, 173 U. S. 461;
R. R. Co. v. Adams, 180 U. S. 41;
Gas Light Co. v. St. Paul, 181 U. S. 142;
Waterworks Co. v. La., 185 U. S. 336.

XI.

Even if the construction put upon the statute by the Missouri courts is faulty (which defendant in error denies), yet the same is not violative of the National Constitution.

Ins. Co. v. Mining Co., 243 U. S. 93 (cases cited).

XII.

The defenses founded on non-payment of the loan and cancellation of the policy are (in the absence of statute) eliminated by the incontestability stipulation in the policy.

Haas v. Ins. Co., 84 Neb. 682 (cases cited);
Harris v. Ins. Co., 248 Mo. 304.

XIII.

A stipulation in an application, policy or loan agreement for forfeiting a policy as a penalty for the non-payment of a loan is (in the absence of statute) in the nature of a usurious extortion and void. The reserve value of a policy is not its true value and it is only by statute it can be made such. Stipulations in policies and policy loan agreements intended to defeat the right of redemption are (in the absence of statute) void and inoperative to vest the absolute right and title in the pledged policy. Nor can the insurer cut off (in the absence of statute) the insured's interest in the pledged policy without a sale thereof and an honest attempt made to procure a purchaser at the best price attainable.

Milliken-Helm Com. Co. v. Albers Com. Co., 244 Mo. 38;
Greer v. Lafayette County Bank, 128 Mo. 559;
Wood v. Matthews, 73 Mo. 477;
Wilson v. Drumrite, 21 Mo. 325;
Smith v. Ins. Co., 173 Mo., *l. c.* 340;
Ins. Co. v. Evans, 124 S. W. (Ky.) 379;
Ins. Co. v. Grigsby, 10 Bush. 310;
Montgomery v. Ins. Co., 14 Bush. 51;
Palmer v. Ins. Co., 121 Minn. 395;
Ins. Co. v. Van Meters, Admr., 137 Ky. 4;
Drury's Admx. v. Ins. Co., 115 Ky. 681;
Toplitz v. Bauer, 161 N. Y., 325;
Bailey v. Am. Deposit Co., 52 App. Div. (N. Y.) 406;
Ins. Co. v. Baker, 85 Ill. 410;
Nashville Trust Co. v. First Nat. Bank, 134 S. W. (Tenn.) 311;
Lucketts v. Townsend, 3 Tex. 119;

Livingston v. Story, 11 Pet. (U. S.) 351;
Groeltz v. Cole, 128 Iowa 340;
Seymour v. Ives, 46 Conn. 109;
Ins. Co. v. Twyman, 122 Ky. 513;
Ins. Co. v. Curry, 115 Ky. 100;
31 Cyc 363. (cases cited);
McEachern v. Ins. Co., 15 Ga. App. 222.

XIV.

In the absence of statute, the pledgee can not confiscate the pledged property. Indeed he is bound to sell the pledged property and he can not even become a purchaser at the sale.

Easton v. German-American Bank, 127 U. S. 532;
Pauley v. State Loan, Etc., Co., 165 U. S. 606;
Harmon, Receiver, v. Nat. Bank, 172 U. S. 644.

XV.

There is no foreclosure provision, either in the policy or loan agreement, and none should be inserted or implied.

Tetley v. McElmurry, 201 Mo., *l. c.* 394;
McCullom v. Ins. Co., 61 Mo. App. 352;
Gruwell v. K. & L. of Security, 126 Mo. App. 496.

ARGUMENT.

I.

That the policy in suit is a Missouri contract is not now a debatable proposition. And being a Missouri contract the non-forfeiture statutes then in force entered into, and became part thereof, as much so as if copied therein. This proposition is so well established that we deem it enough to respectfully call attention to the decisions of this honorable Court, cited under this point I. But plaintiff in error says that the case of Ins. Co. v. Head, 234 U. S. 149, is applicable.

Distinguishing cases parallel to the one at bar in the brief of plaintiff in error in the case of New York Life Insurance Company v. Mary E. Head, defendant in error, 234 U. S. 149, on pages 10 and 11, the following language is used, namely:

> "The decisions which hold that the statutes of Missouri must be read into a policy of insurance entered into between an insurance company and a resident of that state if the policy is delivered in that state do not determine the merits of this controversy.
>
> "In all of the decisions relied upon by the defendant in error in support of the proposition that the amount to be paid under the policy of insurance is determined by the Missouri statutes of 1889, stress is placed not only upon the fact that the insurer entered into the contract in the State of Missouri, but also upon the further fact that the assured was a **citizen and resident** of the State of Missouri.
>
> "The cases of **Smith v. Mutual Benefit Life**, 173

Mo. 329, and **Burridge v. New York Life Insurance Co.**, 211 Mo. 158, are not controlling here. In those cases the contract of insurance was between an insurance company and a **resident** of the State of Missouri, consummated by a delivery of the policy within the State of Missouri **and not thereafter modified by any valid agreement between the parties.** There is a vital distinction between the case at bar and the Smith and Burridge cases, *supra*, in that in this case the contract of insurance was between parties, none of whom were citizens of the State of Missouri. In the opinions of the Supreme Court of Missouri in both the Smith and Burridge cases, *supra*, attention is specifically directed to the fact that the assured at the time they applied for and received their policies were citizens or residents of the State of Missouri. In all of the cases, so far as we are aware, in which the doctrine of those cases has been applied, as well as in those cases on which the Court relied in arriving at the conclusions announced in the Smith and Burridge cases, the assured were **citizens and residents of the state whose statutes were read into the contract of insurance.** The distinction rests on well-settled principles of law. The right of the state to step in and offer its citizens either real or fancied protection as a condition precedent to permitting a foreign company to write insurance within its jurisdiction, is not denied. But those cases do not hold, nor so far as we are aware has it ever been held in any case prior to these, that citizens of different states might not meet in a third state and agree that the contract entered into between them should be performed in and governed by the laws of the domicile of one of them and not by the laws of the state in which it happened that the contract was made. Especially

must this be true where there is nothing inherently illegal or immoral in the subject matter of such contract.

"There is no apparent reason why under the guise of a law declaratory of its public policy, the Legislature of one state should attempt or should be permitted to limit the right to contract between citizens of other states in regard to matters to be performed outside of that state.

"In this case the parties to the contract of insurance, being non-residents of Missouri, agreed that the laws of the state domicile of one of them (New York) should govern as to certain non-forfeiture provisions, instead of the laws of the State of Missouri. It is clear that the denial of this right of contract can not be justified upon any argument based upon the right of the state to protect its own citizens and residents."

Again on page 13 of said brief, the following language is used:

"Attention is again called to the fact that the application and the policy both stated that the assured was a resident of New Mexico. Therefore, the insurance company knew that it was not contracting or dealing with a citizen of Missouri **who would be entitled to invoke the laws declaratory of the public policy of that state.**"

On pages 14 to 16, inclusive, of said brief, the following language is used:

"In this connection, we call attention to the fact that the law of the State of New York equally with the law of the State of Missouri, provides for the non-forfeiture of the policy in question; but in 1894, when the policy was written, the non-forfeiture provisions under the New

> York statute were different from those which obtained in Missouri, although the policy of both states, as established by their legislation, was against the absolute right of the company to declare a forfeiture." See also **Mutual Life Ins. Co. v. Dingley,** 100 Fed. Rep. 408.

Counsel for defendant in error contend that the fact that the assured was not a resident of Missouri is immaterial since the application was made in that state and the policy (as they claim) delivered there. But so far as we have been able to find, there is not a case in the books (certainly not in the cases heretofore cited by counsel for defendant in error) in which it appears that the assured was not a **resident** of the state, the laws of which were being invoked in behalf of the beneficiary as against the express terms of the insurance contract itself. In all of the Missouri cases upon which counsel rely so strongly, especial mention is made of the fact that the assured was a resident of the State of Missouri and more or less stress placed upon that circumstance. In support of this assertion we give the following brief excerpts from the statement of facts or opinions of the Court in the various cases heretofore cited by counsel for the defendant in error. (Black face in all cases are ours.)

In **Cravens v. Insurance Company,** 148 Mo. 583, in the statement of facts, it is said, page 593:

> "That on the 2nd day of May, 1887 (when the assured applied for his policy), and long prior thereto, John K. Cravens was a **citizen of the State of Missouri;**"

and, again, in the same page:

> "That on the 2nd day of May, 1887, the local

agents of defendant solicited said John K. Cravens at **his residence in the County of Jackson, State of Missouri,** to insure his life," etc.;

and again, on page 604, the Court says (quoting from **Price v. Insurance Company,** 48 Mo. App., 281):

"Where an insurance company does business in this state and issues its policies of insurance **to residents of this state,** the validity of clauses in its policies must be determined by the laws of this state."

In **Horton v. Insurance Company,** 151 Mo., p. 604, the syllabus states:

"Although the insured expressly agreed in his application that the contract of insurance should be governed by the New York statute, yet because it appears from the record that company's agent at the Missouri town **where the insured lived** and the application was taken, etc."

and in the statement of facts, it is said, page 612:

"Said T. Lyle Standish, the insured named in the policy, was, at the time of his application therefor, and continually until his death, **a resident of Hume, in Bates County, Missouri,** his application for the policy was there made, etc."

In **Burridge v. Insurance Company,** 211 Mo., p. 162, the statement of facts begins as follows:

"Defendant is a life insurance company incorporated in the State of New York at the times in question and John F. Reifsnyder was a resident and citizen of Missouri and so was his wife, Frances A."

In **Smith v. Mutual Benefit L. I. Co.**, 173 Mo., 329, the statement of the facts begins as follows:

> "This is a suit on a policy of life insurance issued by defendant, which is a New Jersey corporation, on the life of Samuel I. Smith, for the benefit of his wife, the plaintiff, for $10,000.00. Smith and wife were **residents of this state.** The application was made to an agent of defendant in St. Louis and the policy issued there."

In **Whitfield v. Insurance Co.**, 205 U. S. 489, the statute relied upon by the beneficiary of the policy expressly provided that:

> "In all suits upon policies of insurance on life hereinafter issued by companies doing business in this state to a citizen of this state, it shall be no defense that the insured committed suicide, etc."

It is clear, therefore, that in the Whitfield case the respondent was a resident of Missouri.

In **Equitable Life Ins. Co. v. Clements**, 140 U. S., p. 226, the Court calls attention to the fact (*l. c.* 229):

> "The answer admitted that said Wall was a **resident of the State of Missouri**, etc.
>
> "In **Life Insurance Co. v. Russell**, 77 Fed. Rep., 94, where the policy was written in Nebraska, the statement of facts shows clearly that Russell lived and died in Holt County, Nebraska.
>
> "We do not mean to be understood as contending that a state, through its legislation, may not prohibit citizens of other states from making contracts within its territory which are or may be harmful or prejudicial to its citizens or which are to be performed within its territory. We do contend that no state of the Union has the right to

say to the citizens of other states that any contract made between them while temporarily within its territory and irrespective of the place of the performance of such contract, shall contain certain specific provisions and stipulations or that they can not agree while within its boundaries that the laws of the state within which one or the other or both of them are residents shall govern an agreement between them so long as it is not to be performed within the state where the contract is made.

"One state has no right to prescribe public policy for another when its own citizens or territory are in any way concerned."

Then again (pp. 18-19), of said brief, it is said that:

"It is no answer to our contention on this point to say, as the Supreme Court of Missouri has said in its opinion, that 'It is not an open question in this state that all subsidiary contracts made by the parties to all insurance contracts are within the contemplation and purview of the original contract and are not to be treated as independent agreements.'

"The cases of **Burridge v. Insurance Co.**, 211 Mo. 158, and **Smith v. Insurance Co.**, 173 Mo. 329, which are cited by the Supreme Court of Missouri in support of this declaration, are not in point for the reason that in both of these cases the so-called 'subsidiary' contracts (*i. e.*, the loan agreements) were made by residents of Missouri within the territorial limits of Missouri, and, **therefore, the statutes of Missouri might be held to operate upon them just as upon the original contract of insurance.**"

And then again on page 22 of said brief, the following language is used:

"**We do not question the right of the state to impress upon the contracts of its own citizens such terms as are consistent with the legislative declarations of its public policy, or to exact of corporations, as a condition precedent to the right to do business within the state, the observance of such public policy**, but we deny that the state can, without infringement on the constitutional guaranties, impress or impose such legislative declarations of its public policy on the contracts of non-residents, which are to be performed in some other state and in no way affect either property or citizens of the state.

"**The underlying reason why the state has the right to impose its public policy upon the contracts of its citizens, even against the express terms therein contained, is because the contract of insurance affects citizens or subjects of the state and, therefore, the state has the right to demand for them the protection of its laws even against the wishes of the original contracting parties**; but we deny the right of the state to **impose** its policies on the contracts of non-residents when such contracts are not to be performed within the state and affect none of its citizens, in the face of an expressed agreement that the contract shall be governed by the laws of another state.

"**The public policy of a state can only operate either on the citizens or subjects of the state or on transactions to be performed or done within its limits** (Greenhold on Public Policy, p. 2)."

In the same case (Head case), in the plaintiff in error's reply brief, on page 6 thereof, it is said that:

"The rule that impresses the public policy of a state upon contracts made therein, relates only

to contracts to which a resident or citizen of the state is a party. The public policy of a state, in so far as it impresses itself upon contracts, is for the benefit and protection of residents and citizens of the state and has nothing to do with residents and citizens of other states."

It is also said on the same page, that:

"Head of New Mexico and the company of New York in dealing with each other anywhere had a perfect right to agree with each other that their engagements should be controlled by the laws of the domicile of one of them to the exclusion of the laws of Missouri, where neither was domiciled."

And in the brief as reported in Volume 234, we find the following:

"The cases relied on by defendant in error which dealt with contracts of residents or citizens of Missouri, such as Cravens v. Insurance Co., 148 Mo. 583; Price v. Insurance Co., 48 Mo. App. 281; Horton v. Insurance Co., 151 Mo. 604, 612; Burridge v. Insurance Co., 211 Mo. 162; Smith v. Mutual Ins. Co., 173 Mo. 329; Whitfield v. Insurance Co., 205 U. S. 489; Equitable Life Ins. Co. v. Clements, 140 U. S. 226; Life Ins. Co. v. Russell, 77 Fed. Rep. 94, are distinguishable. The policy loan agreement was not a Missouri contract. It was signed and delivered outside the State of Missouri by parties who were non-residents of that state and can not be controlled or governed by the Missouri non-forfeiture laws" (Ins. Co. v. Head, 234 U. S., *l. c.* 151).

And this honorable Court distinguished the Head

case from cases such as the one at bar and said in part, that:

> **"The difference, therefore, between that case"** (meaning the Cravens case) **"and this, is that which, in the nature of things, must obtain between questions concerning the operation and effect of a state law within its borders and upon the conduct of persons confessedly within its jurisdiction, and its right to extend its authority beyond its borders so as to control contracts made between citizens of other states, and virtually, in fact, to disregard the law of such other states by which the acts done were admittedly valid"** (New York Life Insurance Company vs. Head, 234 U. S., *l. c.* 160).

Now, we feel safe in saying that the Head case is in no way applicable.

The decision in the case of Lukens v. Ins. Co., 269 Mo. 574, was a decision by the Court *in banc*, handed down Jan. 17, 1917. In that case the application was made in Illinois. ~~No~~ policy was issued in Missouri by a Missouri corporation. The policy was delivered to the insured in Illinois and, under the laws of Missouri, the plaintiff would have been entitled to recover by virtue of the Missouri suicide statute, but the Court held that the policy was an Illinois contract and the plaintiff was not allowed to recover. In part, the Court said:

> "The delivery of the policy was essential to the completion of the contract and was a prerequisite to an action thereon. By this we mean there must have been a final acceptance by both parties of the terms thereof, and in this case such final acceptance did not take place until the company

presented the policy to the insured and he made payment and accepted it. These last and essential acts took place, as we view the record, in Chicago. Under such circumstances and the uniform law governing the subject, the contract was an Illinois contract, and this, notwithstanding the fact that the appellant is a Missouri corporation with its chief offices in this state and that the policy was signed by its officers and made payable at its home office." (Citing Cravens v. Insurance Co., 148 Mo. 583; Horton v. Insurance Co., 151 Mo. 604; Lange v. Insurance Co., 254 Mo., *l. c.* 503; Head v. Insurance Co., 241 Mo. 403; Insurance Co. v. Head, 234 U. S., *l. c.* 155).

It will be observed that the case of Head v. Ins. Co., 234 U. S., *l. c.* 155 is cited, and if the Missouri Court understood the Head decision as plaintiff in error here claims to understand it, that decision would not have been cited in support of the doctrine there announced.

In the instant case the plaintiff in error, through its agent, Wm. Randolph; address, St. Louis, sought, solicited and secured the insured at St. Louis to make application for the policy in suit. It is provided by the application **"That the issue of the policy and the payment of the first premium thereof in full during my lifetime and good health shall be a condition precedent to any liability of the company under this application"** (Trans., pp. 18, 19). This application was not transmitted to the Home Office by the **insured**, but by the **insurer's St. Louis office.** The exact policy applied for was not issued and neither was the exact application accepted. But a policy differing somewhat from the one applied for was is-

sued on an application which was changed in Missouri, after the policy was issued. This appears from the following:

> "To the New York Life Insurance Company,
> 346 and 348 Broadway, New York:
> **I hereby accept policy No. 2,054,961,** which contained the following clause:
> 'In respect only to profits, this policy is placed in the adjustable accumulation class, and in determining the profits to be apportioned to this policy, the mortality experience of the company among persons insured in that class shall be used.'
> The answer to question No. 11 in my application should be as follows: Endowment, payable in twenty years, with proportionate paid up.
> The answer to question No. — in my application should be as follows: Date policy October 20th.
> **I hereby present this acceptance as an amendment to my application dated the 23rd day of August, 1900, and agree that it shall form a part of said application,** the agreements in which I hereby renew and confirm.
> J. B. Dodge.
> **Dated at St. Louis, Oct. 20th, 1900.**
> Witness:
> G. W. Hall."
>
> (Trans., pp. 20, 21).

So it clearly appears that the first act, namely, making application, and the last acts, namely, change in policy and change in the application, all occurred in Missouri, and hence that the policy is a Missouri contract, is, we think, unquestionable.

With a good deal of confidence we assert that no

case can be found where the application was made in one state and accepted in said state, though issued in another state, holding that the policy was a contract of the state where it was issued and not a contract of the state where the application was made and policy accepted. There is no such case in the plaintiff in error's brief and we challenge the plaintiff in error to produce such a case.

II.

All applications for loans and all loan agreements were made in Missouri to plaintiff in error's St. Louis office. Neither the insured nor defendant in error was ever in the State of New York. And the loan agreements were not subsidiary or independent contracts.

In a case in the Missouri court *in banc* (Smith v. Ins. Co., 173 Mo. 329), which is in every way similar to the case at bar, the Court said:

> "Our law deems the subject of life insurance one that requires especial protection, and in this particular, it has provided that the policy-holder shall have the benefit of the extended temporary insurance specified in section 5856, **'anything in the policy to the contrary notwithstanding.'** Therefore, though a policy should expressly declare that it was agreed between the insurer and the insured that the provisions of the statute relating to extended temporary insurance or commutation should not apply, still they would apply. **And if the parties could not in the beginning place themselves outside the policy of the law, they could not, by an amendment to the contract, do so"** (*l. c.* pp. 340-341).

Then again the Court said:

> "And we hold, also, that the statute declaring that in ascertaining the net value of the policy it 'shall be computed upon the American experience table of mortality with four and a half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be canceled, the balance shall then be taken as a net single premium for temporary insurance for the full amount written in the policy', **does not mean that indebtedness incurred by the assured for money borrowed from the company may also be deducted. The statute means only what it says, that indebtedness on account of past premium payments shall be deducted**" (*l. c.* 341).

In Burridge v. Ins. Co., 211 Mo., *l. c.* 178, the Court said:

> "**We hold now, as we held then, that neither at the policy date nor by any supplemental subsequent contract, in legal effect an amendment to the policy, was it permissible to whittle away the mandate of the non-forfeiting statute requiring the net value of the defaulted policy to be applied to extended insurance. If the deductions made from that net value are notes coming within the statutory description, it is well enough, but if they fall within the interdiction of the statute it is bad. It matters not whether the mischief be done when the policy was executed and springs from its own loins by use of a policy term forbidden by law, or whether it sprang up afterwards by indirection; because it ought not to**

be held that 'one can do in a circle what he can not do on a straight line.' ''

Then again the Court said:

"In that case (meaning the Smith case), therefore, the scope and meaning of that clause of our non-forfeiture insurance statute was held in judgment in the stiffest sense, and this Court decided that the statute was mandatory; that the **character** of the indebtedness to be deducted from the net value before applying the residue to the purchase of temporary or extended insurance must be looked to, and was limited by the clear words of the statute, 'to notes or other evidences of indebtedness to the company, given on account of past premium payments' on the policy issued to the insured, **and did not include notes and evidence of indebtedness arising in other ways''** (p. 172).

"Then from three-fourths of such net value there is to be taken away—what? All indebtedness? Not at all. There shall be taken away 'any notes or other evidence of indebtedness to the company **given on account of past premium payments on said policies'** '' (pp. 171, 172).

In Christensen v. Ins. Co., 152 Mo. App. 551, the policy was issued December 21, 1901, and March 7, 1905, the insured secured a loan from the company. We quote from page 556, where the Court said:

"Neither the statute nor this amendment is, in any sense, retroactive. The statute itself was enacted for the benefit of the assured, and we should bear this in mind in construing the terms of this policy and the loan made under it. The right of the assured to the loan and the duty of the com-

pany to make it, the amount thereof, and the rate of interest to be charged therefor, and all the terms and conditions of the loan are provided for in the policy. The loan was, therefore, contemplated when the policy was issued and the terms of the contract between the parties in relation to it were found in the policy itself, and hence the loan contract is to be construed as a part of the policy, and not as an independent contract made when the loan was applied for and the money furnished." (Citing the Burridge case and continuing):

"Hence, it follows that this policy is to be construed, and the rights of the parties under it determined under the statute as it existed prior to the amendment of 1903, and hence the policy was in force at the time the insured died."

In Gillen v. Ins. Co., 178 Mo. App., *l. c.* 97, the Court said:

"The theory of those cases goes to the effect that the non-forfeiture statute in force at the time the policy is issued enters into it as a parcel of the contract and operates to prohibit any subsequent change or modification thereof between the parties thereto affecting the application of the net value.

"It is also well settled that what can not be done by the original policy contract—'a straight line'—can not be done by a supplemental or collateral contract, in this case a loan agreement, that is, 'can not be done in a circle.'" (Cases cited).

The Court observed also that the non-forfeiture statute in force when the policy was issued entered into and "became the supreme law of every policy."

In McCall v. Ins. Co., 193 S. W. (Mo. App.) at *l. c.* 865, the Court said:

> "But plaintiff says the relation of pledgor and pledgee was created, and that relation was never changed, and insured had the right to pay off his debt at any time even after default, and having offered to do so, plaintiff may do so at this time. **This would be true if the loans were matters wholly separate and independent of the insurance contracts. But they are not.** As said in Burridge v. New York Life Ins. Co., 211 Mo. 158, *loc. cit.* 174, 109, S. W. 560, *loc. cit.* 565:
>
> " 'The loan and pledge contract in the case at bar is in no fair sense a contract distinct and independent from the policy. To the contrary, such loan and pledge was contemplated by the policy itself. It involved the policy; it may be likened unto an egg laid in the policy and subsequently hatched, *i. e.*, was made in pursuance of its terms.' "

But by virtue of the Amendatory Act of 1903 (Laws 1903, p. 208), the company was permitted to deduct the loan from the net value of the policy and was permitted also to confiscate the policy, and, by virtue of the Amendatory Act alone, the Court recognized that under the law of pledges, in the absence of statute, the policy could neither be forfeited nor confiscated.

The case of McKinney *et al.* v. Fidelity Mutual Life Insurance Company, 270 Mo. 305, was an action on a policy for $30,000.00 The company was incorporated under the laws of the State of Pennsylvania and licensed to do business in the State of Missouri. Application for the original policy was made in the

State of Missouri and transmitted to the Home Office in Philadelphia upon which application the policy was issued and delivered to the insured in Missouri. The policy was dated December 29th, 1903, and the premuims were paid to November 1st, 1912, but the premium due on that date was not paid. The insured made application to the Home Office in Philadelphia for a paid-up policy, which was issued in the sum of $2,760.00, but not delivered in the lifetime of the insured. The beneficiaries named in the policy had no knowledge that the insured had applied for a paid-up policy. Some of the learned counsel in the instant case were counsel in that case (McKinney case), and they successfully argued that under the non-forfeiture statutes of Missouri, the insured had a right to apply for the paid-up policy and surrender the original policy and that the same was not an independent or subsidiary contract, but that the paid-up policy was issued in pursuance of the terms of the original contract, and that the Missouri non-forfeiture statute was as much a part of the policy as if copied therein.

The Court, in part, said:

> "There is some contrariety of view in the rulings of other states (cited in the briefs of counsel) respecting the interest remaining in the insured after he had procured a policy in accordance with the ordinary life plan to be made payable to another, coupled with a reserved power to change the beneficiary. The conclusion we have reached from the agreed facts renders it unnecessary to review or attempt to reconcile the conflicting views expressed by the courts of sister states.

"The legal question presented on this appeal are readily resolvable under the **statutes and decisions** of this state. Before calling specific attention to these, it is well to note that we are not called upon to deal with any change made by the insured of the beneficiaries designated when he obtained the policy, for the paid-up policy received by him was payable to the same beneficiaries as the original policy, which was surrendered by him. Not having exercised any power vested in him under that provision of the policy, its terms need not be considered, further than as affording an incidental support (in connection with any other provision incorporated in the policy by law or the agreement of parties) for what was actually done by the insured culminating in the delivery to him of the paid-up policy. If there was warrant for this action on his part, either in the terms put into the original policy by the parties **or written into the policy by force of the statutes of this state**, then the judgment of the Court below must be affirmed" (*l. c.* pp. 315, 316).

And again the Court said:

"With the powers expressed by the **terms of these statutes embodied in the original policy**, it is difficult to see what impediment could exist in the way of the transaction which was had between the insured and the defendant company. They were the parties to the convention, and possessed an absolute right and power to frame their contract as they saw proper, **provided its terms and stipulations were not contrary to any rule of law or public policy of this state**" (*l. c.* 316, 317).

The loan in the instant case was made upon no new consideration, but in pursuance of the agreement contained in the original policy, and it was not a new contract. In Dannehauser v. Wallenstein, 169 N. Y. 199, the Court, in holding that the issuance of a paid-up policy in accordance with the provisions of the original policy did not constitute a new contract, but was merely a continuation of the original policy, says:

> "We are, however, of the opinion that the paid-up policy was not a new contract. It was simply a continuation of the original contract under the option which gave the holder thereof the right, after two or more annual premiums had been paid, to cease paying the annual premiums and take a paid-up policy in exchange for the first one. It was a change in the mere form of the contract expressly provided for by its own terms. It is true that the first policy, the original evidence of the contract between the insured and the company, was 'surrendered to the company and canceled', when the paid-up policy was issued, but this was simply a part of and a compliance with the terms of the original contract. The contract was continued as it provided that it might be, in the form of a paid-up policy, such as was accepted by the defendant. It was not a modification but a fulfillment of the original contract."

And in McDonnell v. Alabama Ins. Co., 85 Ala. 412, the Court, in holding that the issuance of a paid-up policy was but a mere continuation of the original contract or policy of insurance, says:

> "We can perceive nothing in the terms of the

new policy, or in the circumstances of its issue and acceptance, which indicates an intention of the parties to make a new contract discharging or extinguishing the old one. The policy itself does not constitute the contract. It is merely the written evidence of it. Its surrender, therefore, is not necessarily a surrender of the rights acquired under it. The consideration upon which the first or original policy was issued was the representations contained in the application of insurance and the premium. There was no other or additional consideration for the second or paid-up policy. * * * It is our opinion that the cancelling of the original policy and the issue of a paid-up policy in its stead, pursuant to the express agreement to do so, is a mere continuation of the former contract of insurance. * * * This substitution of one paper for another paper was a change merely in the evidence or proof of the contract as modified in accordance with its own original terms."

The cases we have cited under Point II of this brief are all to the same effect.

We challenge the plaintiff in error to produce a single case holding that the non-forfeiture statutes of the state where the application was made for the insurance were not read into the policy or holding that the agreement for a loan value, a cash surrender value, a paid-up value or an extended insurance value, was a subsidiary contract or a contract independent of the original policy.

III.

The Missouri statute permitting insurance companies to make the laws of the state of their incorporation controlling in reference to cash-surrender, paid-up and extended insurance values was enacted in 1895 (Laws 1895, pp. 197-8), and while this statute was in force the policies were issued in the cases of Epperson v. Ins. Co., 90 Mo. App. 432, and Nichols v. Ins. Co., 176 Mo. 355. Prior to that time the insurance companies could not make the laws of their incorporation applicable. (Price v. Ins. Co., 48 Mo. App. 283; Knapp v. Ins. Co., 117 U. S. 414).

In 1899 (Laws 1899, p. 248), the right to make the laws of the home state applicable with respect to the above-named values was stricken out and section 5859, R. S. Mo. 1889, in force when the policy was issued in Cravens v. Ins. Co., 148 Mo. 583, 178 U. S. 389, was re-enacted. This section is the corresponding one to Sec. 7900, R. S. Mo. 1899 and Sec. 6949, R. S. Mo. 1909, and is in the same words.

At the time the policy in the instant case was issued the insurer could not make the laws of its home state applicable either by the policy, application or loan agreement (Whittaker v. Ins. Co., 133 Mo., App. 664; cases cited).

The insurer in the case at bar did not attempt to make by policy stipulations the laws of New York the applicatory laws, but did attempt to do so by the application.

This could not be done for the further reason that said application is no part of the policy, since it is neither attached to said policy nor endorsed thereon as required by Section 7929, R. S. Mo. 1899 (Schuler

v. Metropolitan Life, 175 Mo. App. 130). And for the same reasons, under the laws of New York, the application is no part of the policy (Con. Laws of N. Y., Vol. III, p. 1714, Sec. 58; Becker v. Ins. Co., 153 A. D. [N. Y.] 382; Murphy v. Ins. Co., 83 Misc. 475). Such is the uniform rule of decision (Ellis v. Met. Life, 228 Pa. 230; Palhamus v. Security Life, 163 Fed. 554). It follows, therefore, that the application should not be considered in this case.

The policy stipulation concerning loan and loan agreements, reads:

> "Cash loans can be obtained by the insured on the sole security of this policy **on demand** at any time after this policy has been in force two full years, if premiums have been duly paid to the anniversary of the insurance next succeeding the date when the loan is made. Application for any loan must be made in writing to the Home Office of the company, and the loan will be subject to the terms of the company's loan agreement."

It is clear from the above stipulation that loans were to be made "**on demand.**" No contract therefor was necessary.

It is true the stipulation says that "the loan will be subject to the company's loan agreement", whatever that means, what are the terms of the company's loan agreement? The policy fails to state. The terms are stated alone in the loan agreement and are drastic, for they attempt to confiscate the policy for non-payment of a loan, contrary to the law of pledges and the Missouri non-forfeiture statutes. When the insured read his policy he had a right to presume that the loan agreement would be a valid one.

It is elemental that to become a part of the policy the company's loan agreement should be either set forth in the policy or attached thereto. (See cases cited under this head: III).

IV.

The Missouri non-forfeiture statutes have been in force since 1879, and from that time until the passage of the Amendatory Act of 1903 (Laws 1903, p. 208), said statutes have commanded that three-fourths of the net value of Missouri policies, less notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, shall be taken as a net single premium for temporary insurance for the full amount written in the policy, **anything in the policy to the contrary notwithstanding.**

The same statutes give the insurer the right to have deducted from the amount insured all forborne premiums (fixed at an ordinary life premium) with interest, compounded, at the rate of six per cent per annum.

Are those statutes harsh ones? We think not, for because (1) they allow the insurer to convert to its own use one-fourth of the net value of the policy without in any way accounting therefor, though the same belongs to the insured. (2) They allow the insurer all defaulted premiums (on the basis of an ordinary life premium) with interest compounded thereon. (3) They do not require the insurer to make any loan, but merely apprise the insurer, in advance, that if it does make a loan, unless to pay premiums, it can not appropriate the reserve to repay it. (4)

They do not require the insurer to give a cash surrender value at all and only require a paid-up value to be given in the event application is made therefor within sixty days after default. Our liberties are otherwise more seriously abridged than by the nonforfeiture statutes. Missouri has two volumes of statutes which tell us what we shall and what we shall not do, yet we would be in a serious condition without them. The states do regulate actions between creditors and debtors and if they had no such power they would indeed be feeble. The states often substitute their will for the will of contractors. For instance, a pledgee can not purchase at his own sale. He certainly can not (in the absence of statutes) confiscate the thing pledged, even if he believes, as the plaintiff in error seems to believe, that such transaction is "fair and just."

In the case of Ins. Co. v. Riggs, 203 U. S., *l. c.* pp. 254-5, the Court said:

> "**If a life insurance corporation does not approve such a restriction** (meaning the Missouri misrepresentation statute) **upon the conduct of its affairs it is its privilege to cease doing business.**"

But the plaintiff in error need not quit business in Missouri, because the Amendatory Act of 1903 permits the deduction of all indebtedness from the net value of all policies issued in Missouri since its passage and we fancy that very few policies now in force in Missouri were issued before that time. And under this Amendatory Act the insurer may confiscate the policy, though no other money lenders have such favors granted them (McCall v. Ins. Co., 193 S. W. Mo. App. 860).

But under the Missouri non-forfeiture statute in force when the policy in suit was issued, only loans made to pay premiums are deductible. We have referred to the applicable cases on the subject in our motions to dismiss or affirm on pages 22-26 thereof. And on the same pages we have referred to the cases deciding that the Missouri non-forfeiture statute is constitutional. To avoid repetition we respectfully ask this Honorable Court to take what we have stated in said motions, together with the cases there cited as part of this brief.

V.

Statutes, with their construction, enter into and become a part of the contract as much so as if copied therein. Hence the cases of Cravens v. Ins. Co., 148 Mo. 583, s. c. 178 U. S. 389, and Horton v. Ins. Co., 151 Mo. 604, became constituent elements of the policy in suit and constituted a part of the consideration for entering into the contract; and a decision now holding the Missouri non-forfeiture statute unconstitutional to affect the policy in suit would be an impairment of contract within the meaning of the State and National Constitutions. We have referred to the earlier decisions of this Court in our motions to dismiss or affirm on pages 26-28 thereof, and we have cited later decisions under this head: V.

VI.

It was decided in the case of Ins. Co. v. Riggs, 203 U. S. 243, that the liberty clause of the National Constitution refers to natural, not artificial persons, which decision was followed, as it should have been, by the

St. Louis Court of Appeals in the suicide case of Applegate v. Ins. Co., 153 Mo. App. 63.

VII.

In affirming the similar Missouri Supreme Court decision (Ins. Co. v. Cravens, 178 U. S. 389), this Court held that the Missouri non-forfeiture statute here attacked was constitutional, and held, moreover, that the state had power to prohibit altogether foreign insurance companies from doing business within its borders. The cases we have cited under this head: VII, are all to the same effect.

VIII.

The Missouri courts had jurisdiction in this case and their judgments in no way violate the due process of law clause of the Fourteenth Amendment.

In the case of Enterprise Irig. Dist. v. Canal Co., 243 U. S., *l. c.* 165, 166, the Court said:

> "The due process of law clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable the Court to revise the dicisions of the state courts upon questions of state law." (Cases cited.)
>
> "The questions presented other than those relating to the validity of the state board's adjudication turned exclusively upon the law of the state, and the Court's decision of them is controlling." (Cases cited.)

The numerous cases we have cited under this head: VIII, are all to the same effect.

IX.

Laws relating to a subject, such as laws affecting insurance companies, do not violate the equal protection of the laws clause of the National Constitution. Thus in the case of Ins. Co. v. O'Shea, 244 U. S. 325, the Court said:

> "**As to the denial of the equal protection of the laws, this Court has frequently held that there is nothing in this provision of the Fourteenth Amendment to prevent the States from reasonable classification of subjects for legislative action. This statute applies equally to all owners of irrigation canals. The fact that it does not embrace canals constructed for other uses and purposes does not make it obnoxious to the equal protection clause of the Fourteenth Amendment.**"

X.

The plaintiff in error is not now at liberty to invoke the Constitution, for prior to the time it issued the policy in suit the cases of Cravens v. Ins. Co., 178 U. S. 389 and Horton v. Ins. Co., 151 Mo. 604 had been decided. The cases under this head: X, sustain this view.

XI.

Faulty construction is not violative of the National Constitution.

In the case of Penna. Fire Ins. Co., v. Gold Issue Mining Co., 243 U. S., *l. c.* 96, 97, this Court wrote:

> "The Missouri Court held that it was enough if plaintiff had paid the fees and got the license before instituting this suit. There is nothing to

suggest that it was not candidly construing the Colorado statutes to the best of its ability, **and even if it was wrong something more than an error of construction is necessary** in order to entitle a party to come here under Article IV, §1" (Cases cited.)

XII.

The policy contains the following incontestibility stipulation, namely:

> "This policy is incontestible from date of issue" (Trans., p. 25).

It is the settled law in Missouri that no defense not excepted in the incontestibility clause is available.

Thus, in Harris v. Ins. Co., 248 Mo., *l. c.* 313, the Court said:

> **"The modern rule is that a life insurance policy containing a provision that it shall be incontestible after a specified time, can not be contested by the insured on any ground not excepted in that provision"** (cases cited).

Not only have the courts given full effect to the incontestibility provisions, but with great uniformity they have declined to pronounce a forfeiture for nonpayment of premium where none was provided in the policy. Thus, in the case of Haas v. Ins. Co., 64 Neb. 682, the Court said:

> "A life insurance policy when once it takes effect by payment of the first year's premium and delivery of the policy, does not terminate at the end of the year, but it is a contract for the life of the assured. **If the policy contains no provision for forfeiture thereof by reason of the failure of**

the insured to pay subsequent premiums annually, a failure to pay such premiums on the day named will not constitute a forfeiture of such policy. All that the company can demand in such cases is the right to set off against the amount of indemnity it has bound itself to pay the amount of the premiums remaining unpaid, with interest thereon."

The Haas case was a suit on lapsed policies, and the plaintiff set forth in the petition the non-payment of premiums. The defendant filed a general demurrer, which was sustained. The plaintiff elected to stand on the petition; judgment was entered dismissing the same, from which plaintiff appealed. The plaintiff's claim of recovery was put upon two grounds and are stated by the Court as follows:

"(1) There is no express provision in the policies which provided for a forfeiture because of the failure to pay the annual premium on the date fixed for the payment thereof, nor any provision of like import or from which even an inference might be drawn that a failure to pay the premium *ad diem* would render the policies void or work a forfeiture thereof.

"(2) That non-payment of premium, in view of the incontestability clause in the policies is not a valid ground of defense by the company, because non-payment of premium is not named as an exception in the general provision of 'incontestability'."

The case was reversed and remanded on the first ground, the Court saying:

"The result of our consideration of plaintiff's

first contention above set out renders it unnecessary to consider her second contention."

The Court in the course of the opinion says:

"Counsel for plaintiff in his brief says:

" 'With a good deal of confidence, we assert the negative proposition that no case can be found where a policy of life insurance which contains no express provision providing for a forfeiture has been held to be void or non-enforcible because of the non-payment of a premium.' "

The learned Jurist writing the opinion says:

"The writer has accepted this challenge, but after three days of industrious, independent investigation, he has failed to find such a case. Counsel for defendant have also been unable to meet the challenge thus given."

The Court cited twenty-eight cases and quoted from many of them. Some of these cases were decided by State courts, others by Federal courts and still others by the Supreme Court of the United States. The Court quoted from two authors on the law of insurance, namely, Bacon and May, and also quoted from 19 Am. & Eng. Enc. of Law (2nd Ed.) 44.

There is a very interesting note to this case in 19 Am. & Eng. Am. cases, 67, 68. The note quotes:

"Without a clause providing for a forfeiture of the policy for non-payment, the policy is not forfeited for non-payment of the premium, any more than a land contract is forfeited by non-payment of principal or interest when due."

There are many Federal cases cited in the note as

well as cases from several states. The one cited from Missouri is Gruwell v. K. & L. of Security, 126 Mo. App. 496.

In the Missouri case it is said:

> "In the absence of any stipulation in the contract for forfeiture on the ground of non-payment, the policy will remain in force during the lifetime of the insured, however delinquent he may have become with respect to agreed payments."

And then again the Court says (page 505):

> "Without any agreement that the failure to pay any such installment, or installments, would work a forfeiture of the right to enforce the undertaking of defendant, the only recourse open to defendant, in the event the assured died delinquent, was to deduct the amount of the unpaid premiums from the amount the certificate required it to pay to the beneficiary."

If, therefore, a policy is not forfeited for the non-payment of premiums unless it so stipulates, then for a stronger reason a policy is not forfeited for failure to pay a loan which contains an incontestability provision.

It is no answer to say that the policy may not be contested on other grounds, but may be contested for the non-payment of a loan. To thus construe the incontestability clause it would be necessary to add words and phrases thereto. It is true the incontestability stipulation seemingly make it a hardship upon the plaintiff in error, but it wrote the policy, and should be held bound thereby, notwithstanding it may seem to be a hardship upon it. Moreover, doubtless

plaintiff in error obtained insurance by showing and explaining to persons the advantages contained in its policy over the policies of other companies not containing a general incontestability provision and hence, in the absence of statute, the plaintiff in error should be made to abide by the terms therein. We have shown that neither the application nor the policy loan agreement is a part of the policy, and the policy itself contains no words of forfeiture for failure to pay a loan. It follows that in the absence of the non-forfeiture statutes of Missouri, which plaintiff in error seeks to have declared unconstitutional, it could neither deduct a loan from the net value of a policy nor confiscate it. Such, we think, is the settled rule of decision.

XIII.

The plaintiff in error asserts that the disposition to be made of the pledged property may be regulated by the contract of the parties. And it adds:

"There are no exceptions thereto, so far as I know." (Brief, p. 27). Among the cases there cited is Palmer v. Mutual Life, 114 Minn. 1. On the second appeal in that case (Palmer case) the loan agreement was held invalid, and the attempted cancellation under the loan agreement was held ineffective to vest any interest in the insurer. It was held also that the actions of the insurer, which were in every way similar to the actions of the plaintiff in error here, amounted to a conversion of the policy. The case is well reasoned and many of the applicable cases are reviewed (**Palmer v. Mutual Life, 121 Minn. 395**).

Equally erroneous is the view that other money lenders may appropriate the pledged property to repay

a loan. The plaintiff in error in N. Y. Life Ins. Co. v. Curry, 115 Ky. 100, was told in very plain language that no money lender was allowed to carry on the business in the manner the plaintiff in error was operating.

In the Curry case the Court said:

> "That is pure and simple a provision for the forfeiture of the policy upon such terms as the payee of the note may require and at its option.
>
> "The difference between this and the ordinary unqualified forfeiture lies alone in the extent of its forfeiture. It operates as an enforced conversion without further notice to or consent of the borrower of his collateral, if he promptly fails to pay interest on the debt."

Again the Court said:

> "Forfeitures are disfavored in law. When they are merely penalties for the non-payment of borrowed money they are not allowed. They lead to and themselves are unconscionable oppressions of the unfortunate."

Here the Court quotes from and cites many cases, and continues:

> "In the case at bar there is no perceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of the money had the policy been assigned to the latter as collateral, and a default in the payment of the interest had occurred. If it loans money on its policies held by its policy-holders, its rights as lenders are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds, or policies in other companies, or

gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business, or charter, or charter rights, so far as we are advised, which entitled it to privileges when loaning its money not enjoyed generally by banks, trust companies and other corporations and individuals.''

The same ruling was made in N. Y. Life v. Van Meter's Admr., 137 Ky. 4, and in Drury's Admx. v. N. Y. Life, 115 Ky. 681. And the Georgian Court of Appeals refused to allow the plaintiff in error here to appropriate a policy in the manner it attempts in this case, under a similar policy and policy loan agreement, and that, too, in the absence of a non-forfeiture statute (McEachern v. N. Y. Life, 15 Ga. App. 222) and 31 Cyc. 363 says:

''The pledgee is not entitled, upon the pledgor's default, to take the property as his own in satisfaction of the debt. A provision in the contract by which the absolute property in the pled e is to vest in the pledgee, upon the default of the pledgor, is void, and the pledgor is entitled to redeem.

''Nor can the pledgee cut off the pledgor's interest in the collateral as his own. So where a surety who holds collateral to indemnify him against liability on the debt transfers such collateral to the payee for the purpose of discharging the debt, the transfer does not divest the pledgor of his interest in the collateral and he may still redeem it, even after maturity of his debt.'' (Cases cited.)

To the same effect is the very able opinion in the case of **Ins. Co. v. Twyman, 122 Ky. 513,** in which the Court cites many cases.

The policy and loan agreement construed in the case of N. Y. Life v. Evans, 124 S. W. (Ky.) was substantially, if not literally, like those here. The forfeiting stipulations were pronounced void.

The Court, *loc. cit.* 379, said:

> "**The stipulation for forfeiting a substantial benefit under the policy as a penalty for the non-payment of a note for money loaned was in the nature of a usurious extortion and void as against the statutes**" (interest statutes).

It was ruled in Helm v. Albers, 244 Mo. 38, that the pledgee does not take the legal title upon a deposit of the thing pledged, but only a possessory right to retain the property until the payment of the debt, or a lien upon its proceeds in case it is sold after default of the pledgor.

In Wilson v. Drumrite, 21 Mo. 325, the Court said:

> "It may be admitted that the defendant refused to take a mortgage, and that it was expressly agreed between the parties that there should be no reconveyance of the land except upon the condition of punctual payment at the time indicated; yet, the conveyance was given and taken as security for money to be paid, and therefore, for that very reason is, by the law of the land, a mortgage—a redeemable conveyance, **and it was not in the power of the parties to make it otherwise**" (*l. c.* 329).

The case of Nashville Trust Co. v. First Nat. Bank 134 S. W. (Tenn.) 311, was a case involving the pledge or assignment of a policy. At *loc. cit.* 314, the Court said:

> "**If the pledgor make default, the pledgee may**

> **file a bill in equity and foreclose, or he may sell without judicial process on reasonable notice to the pledgor to redeem the pledge. The absolute title to the thing pledged is not divested out of the pledgor until foreclosure or a sale on proper notice to the pledgee. This is the law of pledge or deposit of property as collateral security for a debt. See Johnson v. Smith, 11 Humph. 397, citing Story on Bailments."**

Lucketts v. Townsend, 3 Tex. 119, 49 Am. Decisions 723, was a case where a colored boy was pledged to one Townsend to secure the payment within six months of $200. Payment not having been made the time was extended for one year, and if payment was not then made it was stipulated that the boy was to become the property of Townsend. Payment not having been made within the year, the boy was sold by Townsend to one Moore. The Court decided in a well-reasoned decision that the stipulation in the contract of pledge to the effect that upon the pledgor's failure to make prompt payment, the title should become absolute in the pledgee, was void.

That in spite of such stipulation title did not pass and could not pass without either a judicial decree or at auction, upon giving reasonable notice to the pledgor to redeem and apprising him of the **time and place of sale.** The Court, in part, said:

> **"Respecting the stipulation in the contract that upon failure to make prompt payment the title to the boy should become absolute in Townsend, the law is well settled that it can be of no effect. Every agreement, says Kent, preventing**

the right of redemption in mortgages of chattels, as of lands, would, no doubt, be equally condemned in the English law, id. If, says Story, a clause is inserted in the original contract, providing that if the terms of the contract are not strictly fulfilled at the time and in the mode prescribed, the pledge shall become irredeemable, it will not be of any avail; for the common law deems such a stipulation unconscionable and void, upon the ground of public policy, as tending to the oppression of debtors.

"The civil law treated a similar stipulation in the same manner, holding it to be a mere nullity (Story's Com. Bail., Sec. 345; Hart v. Burton, 7 J. J. Marsh 322).

"According to these principles, the stipulation intended in the present case to defeat the right of redemption, must be regarded as wholly ineffectual to accomplish that end, and inoperative to vest in the pledgee an absolute right to the property."

In view of the above cases, what becomes of the plaintiff in error's views to the effect that other money lenders have the power to appropriate the thing pledged to repay the loan? No such favors or powers are granted to a bank, trust company or any other lender of money.

In the absence of the non-forfeiture statute, the Missouri court would be bound to decide for the plaintiff.

The cases cited under this head—XIII—are to the same effect. The plaintiff in error admits that the gross premium paid by the insured was used as

follows: "One part of what he paid was used in paying the company's running expenses. Another part was used in paying his share of current death losses; and the unused balance was held in reserve as a credit to his policy" (Brief, p. 21). On the next page (22), speaking of the right to confiscate the policy for the non-payment of a loan equal to the reserve value of the policy, it is asked "Wasn't this fair? Was there anything forfeited?" Of course, it wasn't fair; for the insured had been paying his part of the company's running expenses for seven years, together with his share of the death losses and the policy loan agreement undertakes to forfeit the same in consideration of a loan equal only to the reserve value of the policy. No. It wasn't fair. The transaction was not unlike a case where A makes a deposit of $150 with a bank and then obtains a loan of $50, and after A's loan matures the bank tells him, "Your $150 is forfeited, for we applied $50 to the running expenses of the bank; $50 to losses, and we gave you $50 as a loan." This is fair—you did not forfeit anything. The Courts have repudiated this view repeatedly. The policy has a commercial value. Its value is not determined by the amount of reserve.

In Smith v. Ins. Co., 173 Mo., *l. c.* 340, the Court said:

> **"Such policies doubtless have some commercial value available in the market as collateral security, varying, of course, according to the cirstances of the case."**

The reserve value was held not to be the actual value of the policy in **Palmer v. Mutual Life, 121**

Minn. 395; and in **Toplitz v Bauer, 161 N. Y. 325**; and in **Bailey v. Am. Deposit Co., 52 App. Div. (N. Y.) 406.** Doubtless it was on account of those and similar decisions that the General Assembly of New York passed the Act set forth on page 26 of plaintiff in error's brief, permitting the insurer to confiscate the policy for non-payment of a loan.

If the insurer (in the absence of statute) could satisfy the loan as provided in the loan agreement or policy, why was it necessary for the New York General Assembly to pass such a statute?

Indeed, it is only by special acts or by non-forfeiture statutes such as New York and Missouri now have that policies can be forfeited or confiscated.

XIV.

Moreover, in the absence of statute, the pledgee can not even become a purchaser at the sale of the pledged property.

In Easton v. German-American Bank, 127 U. S., *l. c.* 536-537, the Court said:

> **"By virtue of the pledge, the pledgee has the right by law, on default of the pledgor, to sell the property pledged in satisfaction of the pledgor's obligation. As in that transaction the pledgee is the vendor, he can not also be the vendee. In reference to the pledge and to the pledgor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in a position of a trustee to sell, and is by a familiar maxim of**

equity forbidden to purchase for his own use at his own sale.

"The same principle applies with a like result where real estate is conveyed by a debtor directly to a creditor as security for the payment of an obligation, with a power to sell in case of default. There the creditor is also a trustee to sell, and can not purchase the property at his own sale for his own use."

This is quoted approvingly in Pauley v. State Loan, Etc., Co., 165 U. S. 606. And in the similar case of Harmon, Receiver, v. Nat. Park Bank, 172 U. S. 644, the judgment was affirmed with costs.

The pledgee, therefore, can not, as plaintiff in error seems to think, confiscate the policy, and especially for an inadequate price. The insured received neither "coal" nor "flour" for the value of his policy under the decided cases. There was no foreclosure, in the legal sense, in this case. The transaction was merely an attempted confiscation. There is no provision either in the policy or loan agreement (under the facts in the case for such confiscation) and none should be supplied by construction.

XV.

The policy contains no provision at all for forfeiture, and the loan agreement leans on the policy for such forfeiture. Again, as has been seen, the loan agreement is no part of the contract, since it is neither attached to, indorsed on nor set forth in the policy. Under settled law neither the loan agreement nor the application is a part of the contract

in suit. On page 25 of plaintiff in error's brief two questions are asked, namely:

> "(1) Could the state say the parties could not make any fair agreement they wanted to make for a settlement of the debt? (2) Could the state say the must settle it in just one way and in no other?"

The answers are yes. The State of Missouri has passed a law (Laws 1903, p. 208) which permits, contrary to the law of pledges, the confiscation of Missouri policies, and this law seems to be entirely satisfactory to the plaintiff in error. And the State of New York has passed a similar law (The Insurance Laws of New York, Sec. 16).

Those statutes, Laws of Missouri, 1903, p. 208, and the Insurance Laws of New York, Sec. 16, can not be set aside by an agreement of the parties to the contract, though they are confiscatory in character and operate as a great hardship on the insured and beneficiary, but statutes are paramount to stipulations in policies, and we concede that all policies issued after the passage of the Missouri amendatory act of 1903 may be forfeited and confiscated for non-payment of a loan, though no other lenders of money have such favors granted them.

But statutes are the supreme law of all contracts, and in Missouri, since the amendatory act of 1903, as well as in the State of New York (by virtue of statute) the insurer may (as above stated) confiscate the policy for non-payment of a loan. But since the

Missouri amendatory act was not passed at the time the policy in suit was issued, the motion to dismiss the writ of error for want of jurisdiction should be sustained, or the judgment should be affirmed.

Respectfully submitted,
LOUIS H. BREUER,
JERRE A. COSTELLO and
JAMES J. O'DONOHOE,
Attorneys for Defendant in Error.

Received a copy of the foregoing brief this .. day of December, 1917.

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Attorneys for Plaintiff in Error.

A life insurance policy, issued in Missouri to a resident and citizen of Missouri by a New York corporation with Missouri license, provided that the insured might obtain cash loans on the security of the policy on application at the company's home office, subject to the terms of its loan agreement, and that any indebtedness to the company should be deducted in any settlement of the policy or of any benefit thereunder. *Held*, that this imposed no obligation on the company to make a loan subject to a Missouri nonforfeiture law governing the policy and devoting three-fourths of its net value to satisfaction of premium indebtedness exclusively and extension of the insurance, in case of default.

Upon application, based on such a policy, addressed to the company at New York, accompanied by a loan agreement, both signed by the insured and beneficiary in Missouri, where both were resident citizens, and forwarded, with pledge of the policy as security, through the company's Missouri agent, and all received and accepted at its home office in New York, a loan was made, the amount being remitted by mail to the insured in Missouri in the form of the company's check on a New York bank payable to his order. The agreement declared, in substance, that it was made and to be performed entirely in New York under New York laws. Under it, in accordance with those laws, the pledge was foreclosed and the reserve of the policy extinguished in satisfying the loan. *Held*, that the agreement was a valid New York contract, independent of the policy, and that the foreclosure was a defense to an action on the policy in the courts of Missouri, notwithstanding a Missouri nonforfeiture statute (Rev. Stats. 1899, § 7897), devoting three-fourths of the net value to payment of premium indebtedness exclusively and in extension of the insurance, was there construed as continuing the insurance in force. 189 S. W. Rep. 609, reversed.

THE case is stated in the opinion.

Mr. James H. McIntosh, with whom *Mr. James C. Jones* was on the brief, for plaintiff in error:

New York Life Ins. Co. v. *Head*, 234 U. S. 149, is so much like this case as practically to be decisive of it.

We do not claim the State could not pass a valid law prohibiting a forfeiture. Such laws have been passed in many States and their validity to the extent that they prevent forfeitures has not been questioned.

357. Argument for Plaintiff in Error.

Massachusetts in 1861 was the pioneer in such legislation. "The purpose of the statute," said the Massachusetts court, "is merely to establish a rule which will enable the assured to reap the full benefits of the premiums paid before default on his part." *Carter* v. *John Hancock Ins. Co.*, 127 Massachusetts, 153; *Hazen* v. *Massachusetts Mutual*, 170 Massachusetts, 254.

Without any statute on the subject, this court has recognized the equitable rights of a policyholder who was prevented by war from paying his premiums. The reserve growing out of the premiums belongs in a sense to him who paid them. *New York Life Ins. Co.* v. *Statham*, 93 U. S. 24. *Cf. Board of Assessors* v. *New York Life Ins. Co.*, 216 U. S. 517; *s. c.*, 158 Fed. Rep. 462.

The unused balance Dodge had with the company, the State could say must not be forfeited; but the State could not, without denying the liberty of contract, prevent the parties from making whatever fair agreement they chose to make, to the end that the insured should get back this sum in so many dollars, or in its equivalent in insurance benefits, or in any other proper way. The policy was the property of the insured and the beneficiary. They had a natural right to do with it as they pleased. If they wanted to sell it, they had a right to sell it. If they wanted to borrow money and pledge it as security, they had a right to do so. The company, as a money lender, had a right to lend it on any terms that were fair, and to accept as security the pledge of the policy. And when Dodge quit paying premiums, the company had a right to settle the indebtedness in accordance with the loan agreement and the policy and the laws of New York; and Missouri could not deny them any of these rights without depriving them of their liberty of contract.

The Missouri nonforfeiture law, as extended in this case into the property in question so as not merely to prohibit its forfeiture, but to deny the right or power to

NEW YORK LIFE INSURANCE COMPANY *v.* DODGE.

ERROR TO THE SPRINGFIELD COURT OF APPEALS OF THE STATE OF MISSOURI.

No. 378. Argued January 21, 1918.—Decided April 1, 1918.

A law of a State, governing a life insurance contract made locally between a resident citizen and a locally licensed foreign corporation, and prescribing how the net value of the policy shall be applied to avoid forfeiture if the premium be not paid, cannot be extended so as to prevent the policyholder, while present in such State, and the company from making and carrying out a subsequent, independent agreement in the company's home State, pursuant to its laws, whereby the policy is pledged as security for a loan and afterwards canceled in satisfaction of the indebtedness.

Such attempt to engraft the law of the policy upon the subsequent contract, so that the insurance shall remain enforcible in the courts of the State where the policy was issued without regard to its termination in satisfaction of the loan, is an invasion of the citizen's liberty of contract under the Fourteenth Amendment, and cannot be sustained through the license to the foreign corporation.

use, dispose of, or deal about it in any way whatever, and, whether the parties interested in it so wished or not, to compel the use of it in the narrow way the statute states, is clearly an arbitrary interference with the right of contract, having no just relations to the protection of the public within the scope of legislative power. *Lawton* v. *Steele*, 152 U. S. 133; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161; *McLean* v. *Arkansas*, 211 U. S. 539; *Smith* v. *Texas*, 233 U. S. 630; *Alabama & New Orleans Transp. Co.* v. *Doyle*, 210 Fed. Rep. 173; *Geiger-Jones Co.* v. *Turner*, 230 Fed. Rep. 233; *People* v. *Gilson*, 109 N. Y. 389; *State* v. *Dalton*, 22 R. I. 77; *Ex parte McKenna*, 126 California, 429; *Long* v. *State*, 74 Maryland, 505.

Loans of this character and their foreclosure in the way the loan in question was foreclosed are authorized by the New York Insurance Law, § 16. The New York courts have, without any exception, sustained the validity and finality of the foreclosure of a pledge in the way it was done in this case. *Clare* v. *Mutual Life Ins. Co.*, 201 N. Y. 492; *Palmer* v. *Mutual Life Ins. Co.*, 38 Misc. (N. Y.) 318; *Hayes* v. *New York Life Ins. Co.*, 124 N. Y. Supp. 792. And similar decisions have been rendered in many jurisdictions. The foreclosure canceled the debt and the policy, and ended all contractual relations between the parties. If the loan agreement were a Missouri contract, that fact would not in any respect affect the natural right of one of the parties to borrow and the other to lend money on the pledge of this policy as security, nor would it change the character of the pledge or the necessary legal effect of the foreclosure The pledge would be as valid and its foreclosure as final in Missouri as anywhere. *Chouteau* v. *Allen*, 70 Missouri, 290. But the agreement is a New York contract and governed by the New York law which the parties expressly adopted. *Wayman* v. *Southard*, 10 Wheat. 1, 48; *Robinson* v. *Bland*, 2 Burr. 1077; *Pritchard*

v. *Norton*, 106 U. S. 124, 136; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397; *United States* v. *North Carolina*, 136 U. S. 211; *Coghlan* v. *South Carolina R. R. Co.*, 142 U. S. 101; *Hall* v. *Cordell*, 142 U. S. 116; *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Missouri, 329.

To entertain a suit commenced in 1915 on a policy which then had no existence and which had had no existence since the foreclosure in 1907 cut off all interest of the plaintiff in it, and to render judgment against the defendant upon this nonexistent contract, is to take the defendant's property without due process of law.

The allegations of the answer, the proof of the loan, the terms of the loan agreement, the pledge of the policy, the default, the foreclosure, the satisfaction of the indebtedness and the cancellation of the policy, the legal effect of it all under the laws of New York, are not denied or disputed in this case,—they are ignored; and by ignoring them the plaintiff, without any color of right, is given this judgment.

It will not do to say that if there is any injustice here it is mere error with which this court has nothing to do. Our day in court is not due process of law. The provisions of the Constitution protecting the property of persons "extends to all acts of the State, whether through its legislative, its executive or its judicial authorities." *Scott* v. *McNeal*, 154 U. S. 34; *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226; *Twining* v. *New Jersey*, 211 U. S. 78; *Brand* v. *Union Elevated R. R. Co.*, 238 U. S. 586; *Ex parte Virginia*, 100 U. S. 339, 347.

The Missouri statute, as construed and applied in this case, denies the company the equal protection of the law, because it discriminates between it as a money lender on the one hand and every other money lender on the other, and deprives it of every right and of every remedy commonly accorded to a pledgee of property.

A State may exclude a foreign corporation; it may admit

it upon conditions; but it can impose no condition which will deprive the corporation of its constitutional rights. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *Harrison* v. *St. Louis & San Francisco R. R. Co.*, 232 U. S. 318; *Phœnix Mutual Life Ins. Co.* v. *McMaster*, 237 U. S. 63.

As a matter of fact Missouri did not exact obedience to this nonforfeiture statute, as construed by its courts, as a condition of the company's admission to do business in the State.

Mr. James J. O'Donohoe, with whom *Mr. Louis H. Breuer* and *Mr. Jerre A. Costello* were on the briefs, for defendant in error:

That the policy in suit is a Missouri contract is not now a debatable proposition. And being a Missouri contract, the nonforfeiture statutes then in force entered into, and became part thereof, as much so as if copied therein. *Cravens* v. *New York Life Ins. Co.*, 148 Missouri, 583; *s. c.*, 178 U. S. 389; *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Lukens* v. *Insurance Co.*, 269 Missouri, 575.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, is inapplicable. In that case the insured was not a resident of Missouri. So far as we have been able to find, there is not a case in the books in which it appears that the assured was not a resident of the State, the laws of which were being invoked in behalf of the beneficiary as against the express terms of the insurance contract itself.

All applications for loans and all loan agreements were made in Missouri to plaintiff in error's St. Louis office. Neither the insured nor defendant in error was ever in the State of New York. And the loan agreements were not subsidiary or independent contracts. *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Missouri, 329; *Burridge* v.

Insurance Co., 211 Missouri, 178; *Christensen* v. *Insurance Co.*, 152 Mo. App. 551, 556; *Gillen* v. *Insurance Co.*, 178 Mo. App. 97; *McCall* v. *Insurance Co.*, 196 Mo. App. 333; *McKinney* v. *Fidelity Mutual Life Ins. Co.*, 270 Missouri, 305. The loan was made upon no new consideration, but in pursuance of the agreement contained in the original policy, and it was not a new contract. *Dannehauser* v. *Wallenstein*, 169 N. Y. 199; *McDonnell* v. *Alabama Ins. Co.*, 85 Alabama, 412; and cases *supra*.

When the policy was issued the insurer could not make the laws of its home State applicable either by the policy, loan application or loan agreement. *Whittaker* v. *Insurance Co.*, 133 Mo. App. 664, and cases cited. It attempted it not by the policy stipulations but by the loan application. This could not be done for the further reason that the application is no part of the policy, since it is neither attached to it nor indorsed thereon as required by § 7929, Mo. Rev. Stats. 1899. *Schuler* v. *Metropolitan Life Ins. Co.*, 175 Mo. App. 130. And for the same reasons, under the laws of New York, the application is no part of the policy. Con. Laws of N. Y., vol. III, p. 1714, § 58; *Becker* v. *Insurance Co.*, 153 App. Div. 382; *Murphy* v. *Insurance Co.*, 83 Misc. (N. Y.) 475. Such is the uniform rule of decision. *Ellis* v. *Metropolitan Life Ins. Co.*, 228 Pa. St. 230; *Paulhamus* v. *Security Life & Annuity Co.*, 163 Fed. Rep. 554. It follows, therefore, that the application should not be considered in this case. The policy stipulated that loans were to be made "on demand." No contract therefor was necessary. It is elemental that to become a part of the policy the company's loan agreement should be either set forth in the policy or attached thereto.

Section 7897, Mo. Rev. Stats. 1899, commands that three-fourths of the reserve value, less notes or other evidence of indebtedness given on account of past premium payments, shall be taken as a net single premium for

temporary insurance for the full amount written in the policy. No other evidence of indebtedness is deductible on policies issued from 1879 to the passage of the amendatory Act of 1903 (Laws 1903, p. 208). This statute has been held constitutional in the following cases. *Cravens* v. *New York Life Ins. Co.*, 148 Missouri, 583; *s. c.* 178 U. S. 389; *Horton* v. *Insurance Co.*, 151 Missouri, 604; *Burridge* v. *Insurance Co.*, 211 Missouri, 158. See also *Mun* v. *Insurance Co.*, 181 S. W. Rep. 609; *Turner* v. *Land & Timber Co.*, 259 Missouri, 15; *Schmidt* v. *United Order of Foresters*, 259 Missouri, 491; *Dennis* v. *Modern Brotherhood of America*, 231 Missouri, 211.

The liberty clause of the National Constitution refers to natural, not artificial, persons. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243; *Applegate* v. *Insurance Co.*, 153 Mo. App. 63.

The defenses founded on nonpayment of the loan and cancellation of the policy are, in the absence of statute, eliminated by the incontestability stipulation in the policy. *Haas* v. *Insurance Co.*, 84 Nebraska, 682; *Harris* v. *Insurance Co.*, 248 Missouri, 304.

A stipulation for forfeiting a policy as a penalty for the nonpayment of a loan, in the absence of statute, is in the nature of a usurious extortion and void. The reserve value of a policy is not its true value and it is only by statute it can be made such. Stipulations in policies and policy loan agreements intended to defeat the right of redemption are, in the absence of statute, void and inoperative to vest the absolute right and title in the pledged policy. [Citing numerous cases.]

In the absence of statute, the pledgee cannot confiscate the pledged property. Indeed he is bound to sell the pledged property and he cannot even become a purchaser at the sale. *Easton* v. *German-American Bank*, 127 U. S. 532; *Pauly* v. *State Loan & Trust Co.*, 165 U. S. 606; *Harmon* v. *National Park Bank*, 172 U. S. 644.

There is no foreclosure provision, either in the policy or loan agreement, and none should be inserted or implied. *Telley* v. *McElmurry*, 201 Missouri 394; *McCullom* v. *Insurance Co.*, 61 Mo. App. 352; *Gruwell* v. *K. & L. of Security*, 126 Mo. App. 496.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Defendant in error brought suit January 27, 1915, in Circuit Court, Phelps County, Missouri, upon a policy dated October 20, 1900, on life of her husband, Josiah B. Dodge, who died February 12, 1912. She alleged: That plaintiff in error, a New York corporation, had long maintained local offices and carried on the business of life insurance in Missouri, where she and her husband resided; that in 1900, at St. Louis, he applied for and received the policy, she being named as beneficiary; that premiums were paid to October 20, 1907, when the policy lapsed, having then a net value, three-fourths of which, less "indebtedness to the company given on account of past premium payments" applied as required by the Missouri nonforfeiture statute (§ 7897) sufficed to extend it beyond assured's death. Further, that upon application by assured and herself presented at St. Louis the company there made him loans amounting, October 20, 1907, to $1,350, but of this only $599.65 had been applied to premiums. She asked judgment for full amount of policy less loan, unpaid premiums, interest, etc.

Answering, the company admitted issuance of policy, but denied liability because assured borrowed of it, November 1906, at its Home Office, New York City, $1350, hypothecating the policy there as security and then failed to pay premium due October 20, 1907, whereupon in strict compliance with New York law and agreements made there the entire reserve was appropriated to sat-

isfy the loan, and all obligation ceased. The assured being duly notified offered no objection. It further set up that as the loan, pledge and foreclosure were within New York the Federal Constitution protected them against inhibition or modification by a Missouri statute; and if intended to produce such result § 7897, Rev. Stats. Mo., 1899, lacked validity.

In reply, defendant in error denied assent to alleged settlement; maintained all transactions in question took place in Missouri; and asserted validity of its applicable statutes.

The Springfield Court of Appeals affirmed a judgment for $2,233.45—amount due after deducting loan, unpaid premiums, etc. 189 S. W. Rep. 609. It declared former opinions of the state Supreme Court conclusively settled the constitutionality of § 7897 and that the reserve, after paying advances for premiums, was thereby appropriated to purchasing term insurance, notwithstanding any contrary agreement. *Burridge* v. *Insurance Co.*, 211 Missouri, 158; *Smith* v. *Mutual Benefit Life Ins. Co.*, 173 Missouri, 329. Effort to secure a review by the Supreme Court failed.

Section 7897, Rev. Stats. of Mo., 1899, in effect until amended in 1903, provides: "No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, . . . shall, after payment upon it of three annual payments, be forfeited or become void, by reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed . . . and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance

shall be taken as a net single premium for temporary insurance for the full amount written in the policy; . . ." This section and number 7899 are in the margin.[1]

[1] "Sec. 7897. Policies non-forfeitable, when.—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this state, on and after the first day of August, A. D. 1879, shall, after payment upon it of three annual payments, be forfeited or become void, by reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation, to wit: The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent. interest per annum, and after deducting from three-fourths of such net value, any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but, if the policy shall be an endowment, payable at a certain time, or at death, if it should occur previously, then, if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium for a pure endowment of so much as said premium will purchase, determined by the age of the insured at date of default in the payment of premiums on the original policy, and the table of mortality and interest aforesaid, which amount shall be paid at end of original term of endowment, if the insured shall then be alive." (R. S. 1889, § 5856, amended—r.) [By Act of Missouri Legislature approved March 27, 1903, this section was amended by substituting for the words "any notes or other evidence of indebtedness to the company, given on account of past premium payments on said policies, issued to the insured, which indebtedness shall be then canceled" the following ones: "any notes given on account of past premium payments on said policy issued to the insured, and any other evidence of indebtedness to the company, which notes and indebtedness shall be then canceled."]

"Sec. 7899. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered

Both defendant in error and her husband, the assured, at all times here material resided in Missouri. Being duly licensed by that State, plaintiff in error, responding to an application signed by Josiah B. Dodge at St. Louis, issued and delivered to him there a five thousand dollar twenty year endowment policy upon his life, dated October 20, 1900, naming his wife beneficiary but reserving the right to designate another. Among other things, it stipulated: "Cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years, if premiums have been duly paid to the anniversary of the insurance next succeeding the date when the loan is made. Application for any loan must be made in writing to the Home Office of the company, and the loan will be subject to the terms of the company's loan agreement. The amount of loan available at any time is stated below, and includes any previous loan then unpaid. Interest will be at the rate of five per cent. per annum in advance." Continuation after failure to pay premium was guaranteed, also reinstatement within five years. It further provided: "Premiums are due and payable at the Home Office,

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by the value of the policy as determined in § 7897, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in the payment of premium, anything in the policy to the contrary notwithstanding: *Provided, however*, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy within ninety days after the decease of the insured; *and provided also*, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent. interest per annum of all the premiums that had been foreborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid." (R. S. 1889, § 5858—t.)

unless otherwise agreed in writing, but may be paid to an agent producing receipts signed by one of the above-named officers and countersigned by the agent. If any premium is not paid on or before the day when due, or within the month of grace, the liability of the company shall be only as hereinbefore provided for such case." "Any indebtedness to the company, including any balance of the premium for the insurance year remaining unpaid will be deducted in any settlement of this policy or of any benefit thereunder."

By an application addressed to the company at New York accompanied by a loan agreement, both signed at St. Louis and "forwarded from Missouri Clearing House branch office, August 29, 1903," together with pledge of the policy—all received and accepted at the Home Office in New York City—the assured obtained from the company a loan of $490. Its check for the proceeds drawn on a New York bank and payable to his order was sent to him at St. Louis by mail. Annually thereafter the outstanding loan was settled and a larger one negotiated—all in substantial accord with plan just described. The avails were applied partly to premiums; the balance went directly to assured by the company's check on a New York bank. Copies of last application, loan agreement and instruction which follow indicate the details of the transaction.

[Application]

Nov. 9, 1906.

New York Life Insurance Company, 346 & 348 Broadway, New York.

Re Policy No. 2,054,961.

Application is hereby made for a cash loan of $1,350.00 on the security of the above policy, issued by the New York Life Insurance Company on the life of Josiah B. Dodge, subject to the terms of said Company's Loan Agreement.

Said policy is forwarded herewith for deposit with said Company as collateral security, together with said Company's Loan Agreement duly signed in duplicate.

JOSIAH B. DODGE. LEO F. DODGE.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906. M. F. BAYARD, Cashier.

[POLICY LOAN AGREEMENT.]

Pursuant to the provisions of Policy No. 2054961 issued by the New York Life Insurance Company on the life of Josiah B. Dodge, the undersigned has this day obtained a cash loan from said Company of the sum of thirteen hundred fifty dollars ($1,350.00), the receipt of which is hereby acknowledged, conditioned upon pledging as collateral said policy with said Company as sole security for said loan and giving assent to the terms of this Policy Loan Agreement; therefore,

In consideration of the premises, the undersigned hereby agree as follows:

1. To pay said Company interest on said loan at the rate of five per cent per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter.

2. To pledge, and do hereby pledge, said policy as sole security for the payment of said loan and interest and herewith deposit said policy with said Company at its Home Office.

3. To pay said Company said sum when due with interest, reserving, however, the right to reclaim said policy by repayment of said loan with interest at any time before due, said repayment to cancel this agreement without further action.

4. That said loan shall become due and payable—

(a) Either if any premium on said policy or any in-

terest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by satisfying said loan in the manner provided in said policy;

(b) Or, (1) on the maturity of the policy as a death claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the selection of a discontinuing option at the end of any dividend period. In any such event the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy.

5. That the application for said loan was made to said Company at its Home Office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said Home Office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said Company.

In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals this eighth day of November, 1906.

JOSIAH B. DODGE (L. S.) LEO F. DODGE (L. S.)

Signed and sealed in presence of GEO. T. LEWIS.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906. M. F. BAYARD. Cashier.

[Instruction.]

Nov. 9, 1906.

New York Life Insurance Company, 346 & 348 Broadway, New York.

Re Policy No. 2,054,961.

Please deduct from the cash loan of $1,350.00 applied for on Nov., 1906, on the security of the above policy,

an amount sufficient to pay present loan and prem. and int. to Oct., '07.

JOSIAH B. DODGE. LEO F. DODGE.

Witness: Geo. T. Lewis.

Forwarded from Missouri Clearing House, Branch Office, Nov. 9, 1906. M. F. BAYARD, Cashier.

The premium due October 20, 1907, not being paid, the company applied entire reserve in discharge of insured's indebtedness as provided by laws of New York and sent him by mail the following letter.

New York, December 17th, 1907.

Mr. Josiah B. Dodge, 4952 Maryland Ave., St. Louis, Mo.

Re Policy No. 2054961.

DEAR SIR: By a loan agreement executed on the 8th day of November, 1906, the above policy on the life of Josiah B. Dodge was pledged to and deposited with the New York Life Insurance Company as collateral security for a cash loan of $1350.00.

The premium and interest due on said policy on the 20th day of October, 1907, not having been paid, the principal of said loan became due and has been settled according to the terms of the policy, and the policy has no further value.

Yours truly, JOHN C. MCCALL, Secretary, By E. M. C.

This was received by assured December 19, 1907, and neither he nor the beneficiary, during his life, offered objection to the action taken.

That the policy when issued to Dodge became a Missouri contract, subject to its statutes, so far as valid and applicable, is undisputed and clear. The controlling doctrine in that regard was announced and applied in *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, and *Northwestern Life Insurance Co.* v. *Riggs*, 203 U. S.

243. In each of those cases the controversy related to the interpretation and effect of an original policy—not a later good faith agreement between the parties. We held that to the extent there stated the State had power to control insurance contracts made within its borders. With those conclusions we are now entirely content; but they do not rule the question presently presented. Here the controversy concerns effect of the state statute upon agreements between the parties made long after date of the policy and action taken thereunder; their essential fairness and accordance with New York laws are not challenged.

Considering the circumstances recited above, we think competent parties consummated the loan contract now relied upon in New York where it was to be performed. And, moreover, that it is one of a kind which ordinarily no State by direct action may prohibit a citizen within her borders from making outside of them. It should be noted that the clause in the policy providing "cash loans can be obtained by the insured on the sole security of this policy on demand, etc.," certainly imposed no obligation upon the company to make such a loan if the Missouri statute applied and inhibited valid hypothecation of the reserve as security therefor as defendant in error maintains. She cannot, therefore, claim anything upon the theory that the loan contract actually consummated was one which the company had legally obligated itself to make upon demand.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, we held a Louisiana statute invalid which undertook to restrict the right of a citizen while within that State to place insurance upon property located there by contract made and to be performed beyond its borders. We said "the mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it," and ruled

that under the Fourteenth Amendment the right to contract outside for insurance on property within a State is one which cannot be taken away by state legislation. So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed and must be accepted as established. *Nutting* v. *Massachusetts*, 183 U. S. 553, 557; *Delamater* v. *South Dakota*, 205 U. S. 93, 102; *Provident Savings Assn.* v. *Kentucky*, 239 U. S. 103, 114; *Adams* v. *Tanner*, 244 U. S. 590, 595.

The court below rested its judgment denying full effect to the loan agreement upon *Smith* v. *Mutual Benefit Life Ins. Co.*, *supra*, and *Burridge* v. *Insurance Co.*, *supra*. In them the Supreme Court distinctly held § 7897 controlling and the insurer liable upon policies actually issued in Missouri notwithstanding any subsequent stipulation directing different disposition of reserve after default. In the latter it expressly approved the doctrine of the first and, among other things, (p. 171) said:

"Attending to that section [No. 7897] as it read when the policy issued and when the insured died, it will be observed that the net value of the policy is to be computed. Then from three-fourths of such net value there is to be taken away—what? All indebtedness? Not at all. There shall be taken away 'any notes or other evidence of indebtedness to the company, *given on account of past premium payments on said policies*.' The residue, if any, then goes automatically to the purchase of temporary or extended insurance . . . In that [the Smith] case, therefore, the scope and meaning of that clause of our non-forfeiting insurance statute was held in judgment in the stiffest sense and this court decided that the statute was mandatory; that the *character* of the indebtedness to be deducted from the net value before applying the residue to the purchase of temporary or extended in-

surance must be looked to and was limited by the clear words of the statute 'to notes or other evidences of indebtedness to the company, given on account of past premium payments' on the policy issued to the insured; and did not include notes and evidences of indebtedness arising in other ways. It is not apparent, assuming the statute be constitutional, how, giving heed to the hornbook maxim, *expressio unius*, etc., any other conclusion could have been arrived at in reason. It was held furthermore, in effect, that such provisions of law evidenced a sound and just governmental policy, and wrote into every policy of life insurance, coming within its purview, a mandate not to be abrogated in whole, or hedged about or lopped off in detail, by policy provisions, nor to be contracted away otherwise than as prescribed by statute."

Treating the loan to Dodge as made under a New York agreement which Missouri lacked power directly to control, the question presented becomes similar in principle to the one decided in *New York Life Insurance Co.* v. *Head*, 234 U. S. 149. There suit was instituted in Missouri upon a policy personally applied for and received while in that State by a citizen of New Mexico. Nine years afterwards, having duly acquired the policy in New Mexico, the transferee wrote from there to the insurer in New York and effected a loan under an agreement like the one now before us. The state courts held the policy a Missouri contract and the loan agreement controlled by its nonforfeiture statute.

Assuming the policy to be a Missouri contract, we declared that State without power to extend its authority over citizens of New Mexico and into New York and forbid the later agreement there made simply because it modified the first one. We said: "It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York

and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." The reasoning advanced by the Missouri Supreme Court to support its ruling was thus summarized: "As foreign insurance companies have no right to come into the State and there do business except as the result of a license from the State and as the State exacts as a condition of a license that all foreign insurance companies shall be subject to the laws of the State as if they were domestic corporations, it follows that the limitations of the state law resting upon domestic corporations also rest upon foreign companies and therefore deprive them of any power which a domestic company could not enjoy, thus rendering void or inoperative any provision of their charter or condition in policies issued by them or contracts made by them inconsistent with the Missouri law." And this argument we declared unsound since the "proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority—a distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States."

Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making

beyond them by direct inhibition; and applying the principles accepted and enforced in *New York Life Insurance Co.* v. *Head*, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the State and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, § 7897 transcends the power of the State. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment.

Reversed.

MR. JUSTICE BRANDEIS, dissenting.

A statute of Missouri, Rev. Stats., 1899, § 7897, prohibited life insurance companies authorized to do business within the State from forfeiting a policy for default in the payment of premiums, if three full years' premiums had been paid thereon. The act provided further that in case of such default the policy should be automatically extended and commuted into paid-up term insurance. And it determined mathematically the length of the term, as that for which insurance could, at a rate prescribed, be purchased with a single premium equal in amount to three-fourths of the reserve or net value less any indebtedness to the company "on account of past premium payments." The obligation imposed upon the company by this statute, as construed by the highest court of the State, could not be modified by contract with the insured whether entered into at the time the policy was written or subsequently. *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226; *Smith* v. *Mutual Benefit Life Insurance Co.*, 173 Missouri, 329. Such nonforfeiture laws are an exercise

of the police power; and, as insurance is not interstate commerce, the State's power in this respect is as great over foreign as over domestic corporations. *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 566; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401; *Northwestern Life Insurance Co.* v. *Riggs*, 203 U. S. 243.

In 1900 Dodge, a citizen and resident of Missouri, applied in that State to the New York Life Insurance Company, a New York corporation, for a policy on his life in favor of his wife. The policy was delivered to the assured in Missouri where the company had an office and was authorized by the Missouri statute to do business; and there the first and later premiums were paid and, until his death, Dodge and the beneficiary lived and the company continued so to do business.

In 1906 Dodge entered into a supplemental agreement with the company by which he nominally borrowed $1,350, pledged his policy as collateral, and agreed that, in case of default in repaying the loan, the company might discharge it by applying thereto the reserve of the policy. In 1907 Dodge made default in payment both of the premium and of the loan. The reserve of the policy was then less than the amount due on the whole loan; but three-fourths of the reserve exceeded that part of the loan which had been applied to the payment of past premiums by $275.79. This excess, if applied in commutation for term insurance, would have extended the policy to December 23, 1912. The company claimed the right to use the whole of the reserve to satisfy the whole of the loan, so applied it, and notified the assured, on December 17, 1907, that its obligation on the policy ceased. Dodge died February 12, 1912. The beneficiary, insisting that by reason of the Missouri statute the policy was still in force when her husband died, brought suit thereon in a state court of Missouri and recovered judgment, which was affirmed by the Springfield Court of Appeals (189

S. W. Rep. 609); and the Supreme Court of the State refused a review. The case comes here on writ of error under § 237 of the Judicial Code. The company asserts that the loan agreement was made in New York; and, relying upon *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, contends that the state court, in denying full effect to that contract, deprived it of liberty, property, and equal protection of the laws in violation of the Fourteenth Amendment.

First: Was the loan agreement in fact made in New York?

The policy was confessedly a Missouri contract. Dodge, so far as appears, was never out of Missouri. Physically every act done by Dodge and the beneficiary in connection with the loan agreement, as with the policy, was done in Missouri: (a) They signed there the application for the loan; (b) they signed there the loan agreement; (c) they signed there the request upon the company to pay itself, out of the $1,350 nominally borrowed, the amount of an earlier loan with interest to October, 1907, and of the premium; (d) he delivered there (at the Missouri Clearing House Branch Office) the policy given as collateral and these three papers, which were forwarded by that office November 9, 1906, and received in New York three days later; (e) he paid there the balance of the premium, $116.40 in cash; for the sum of $1,350, nominally advanced then, was insufficient to pay off the then existing loan with interest and the accrued premium. Throughout these transactions the company was authorized to do business in Missouri and was, in these transactions, actually doing business there. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579.

Nothing was done in New York then except this: The papers received from the Missouri Clearing House Branch Office were examined and filed in the Home Office; and

certain calculations and appropriate entries in the books and on the papers were made there. No money was paid then to Dodge. The nominal advance was less than the amount, including accrued premium, then due by him to the company; and Dodge balanced the account by paying in Missouri $116.40. In 1903, when a similar loan agreement was made, the nominal amount of the loan exceeded the sum due for premiums by $486.91; and a check for that sum was drawn by the company in New York and sent by mail from there to Dodge in Missouri. In 1904 a further check for $92.10 was sent from New York by the company to Dodge under a similar loan agreement. Under the 1903 agreement the policy was delivered to the company and it had remained in the company's possession at the Home Office. But when the loan agreement here in question was made, nothing was done in New York except to examine and file the papers and to make the calculations and entries. No discretion was exercised there by the company's official. By the terms of the policy the company had already assented to the amount nominally advanced as a loan and to the rate of interest to be charged. The functions exercised by the officials at New York were limited to determining whether the calculations were correct and whether papers were properly executed and filed.

These acts so done by the company at its Home Office in connection with the loan agreement were similar in character to those performed when the policy was written. The application for the policy addressed to the company at its Home Office was likewise delivered at the Missouri Clearing House and forwarded to the Home Office. The application was considered and accepted in New York. The policy was executed there. It provided that the premiums and the insurance should be payable there. But such acts did not prevent the policy being held to be a Missouri contract. *Equitable Life Assurance Society*

v. *Clements, supra; Northwestern Life Insurance Co.* v. *McCue*, 223 U. S. 234. Even if the loan agreement be treated as an independent contract, it should, if facts are allowed to control, be held to have been made in Missouri. But the loan agreement was not an independent contract; nor is it to be treated as a modification of the original contract. It was an act contemplated by the policy and was subsidiary to it, as an incident thereof. What was done by the officials at the Home Office was not making a New York contract, but performing acts under a Missouri contract.

Second: What is the effect of the provision in the loan agreement that it shall be deemed to have been made in New York?

The provision "That the application for said loan was made to said company at its Home Office in the City of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said Home Office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said company" is inoperative. For acts essential to the making of any agreement involving a pledge of the policy were done by Dodge, by the beneficiary, and by the company's agent in Missouri and were subject to the prohibition of a statute of that State which prevented the operation there of inconsistent New York laws. If the laws of Missouri and of New York had left the parties free to contract insurance on such terms as they pleased, they might with effect have elected to be bound by the law of the State of their preference, whatever the place of the contract; in doing so, they would in effect have specified terms of the contract. But provisions in contracts for incorporating the laws of a particular State are inoperative, so far as the law agreed upon is inconsistent with the law of the

State in which the contract is actually made. *Mutual Life Insurance Co.* v. *Hill*, 193 U. S. 551, 554; *Knights of Pythias* v. *Meyer*, 198 U. S. 508. Where the validity of a provision is dependent upon the place in which the contract is made, the actual facts alone are significant. Persons resident in Missouri, who enter there into a contract which is specifically controlled by the laws of that State, cannot, by agreeing that a modification inconsistent with the requirements of the Missouri law shall be deemed to have been made elsewhere, escape the prohibition of the Missouri statute. The fact that one of the parties to the contract is a corporation and hence capable of having a residence also in another State, and that some acts in connection with the contract were done by it there, does not affect the result. The company, although a foreign corporation, was, for this purpose, a resident of Missouri, or at least, was present in Missouri. *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100; *Dunlop Pneumatic Tyre Company* v. *Actien-Gesellschaft, etc.*, 1 K. B. (1902) 342.

Third: Even if the rules ordinarily applied in determining the place of a contract required this court to hold, as a matter of general law, that the loan agreement was made in New York, it would not necessarily follow that the Missouri statute was unconstitutional because it prohibited giving effect in part to the loan agreement. There is no constitutional limitation by virtue of which a statute enacted by a State in the exercise of the police power is necessarily void, if, in its operation, contracts made in another State may be affected. *Emery* v. *Burbank*, 163 Massachusetts, 326; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664. The test of constitutionality to be applied here is that commonly applied when the validity of a statute limiting the right of contract is questioned, namely: Is the subject-matter within the reasonable scope of regulation? Is the end

legitimate? Are the means appropriate to the end sought to be obtained? If so, the act must be sustained, unless the court is satisfied that it is clearly an arbitrary and unnecessary interference with the right of the individual to his personal liberty. Here the subject is insurance; a subject long recognized as being within the sphere of regulation of contracts. The specific end to be attained was the protection of the net value of insurance policies by prohibiting provisions for forfeiture; an incident of the insurance contract long recognized as requiring regulation. The means adopted was to prescribe the limits within which the parties might agree to dispose of the net value of the policy otherwise than by commutation into extended insurance; a means commonly adopted in nonforfeiture laws, only the specific limitation in question being unusual. The insurance policy sought to be protected was a contract made within the State between a citizen of the State and a foreign corporation also resident or present there. The protection was to be afforded while the parties so remained subject to the jurisdiction of the State. The protection was accomplished by refusing to permit the courts of the State to give to acts done within it by such residents (Dodge did no act elsewhere), the effect of nullifying in part that nonforfeiture provision, which the legislature deemed necessary for the welfare of the citizens of the State and for their protection against acts of insuring corporations. The statute does not invalidate any part of the loan; it leaves intact the ordinary remedies for collecting debts. The statute merely prohibits satisfying a part of the debt out of the reserve in a manner deemed by the legislature destructive of the protection devised against forfeiture. The provision may be likened to homestead and exemption laws by which creditors are limited in respect to the property out of which their claims may be enforced. When the New York Life Insurance Company sought and ob-

tained permission to do business within the State, and when the policy in question and the loan agreement were entered into, this statute was in existence and was of course known to the company. It has no legal ground of complaint, when the Missouri courts refuse to give to the loan agreement effect in a manner and to an extent inconsistent with the express prohibition of the statute. The significance of the fact that this suit was brought in a Missouri court must not be overlooked. See *Bond* v. *Hume*, 243 U. S. 15; *Union Trust Co.* v. *Grosman*, 245 U. S. 412.

New York Life Insurance Co. v. *Head*, *supra*, furnishes no support for the contention made by the company here. The facts differ widely in the two cases. There the insured was not a citizen or resident of Missouri and does not appear ever to have been within the State except at the time when the application was made and the policy delivered. Here the insured was at all times a citizen and resident of the State. There the insured had assigned the policy to his daughter, who was a citizen of New Mexico and, so far as appears, had never been within the State of Missouri. Here the insured remained the owner of the policy. There the loan agreement was made by the assignee, a stranger to the policy; and the assignment being accepted and acted upon by the company resulted in a novation of the contract. Here the loan agreement was made by the insured. There every act in any way connected with the loan agreement, whether performed by the company or by the assignee (the insured performed none) was performed in some State or Territory other than Missouri. Here every act was performed in Missouri except as above stated. If this court had held constitutional the statute of Missouri as construed by its Supreme Court in that case, it would have sanctioned, not regulation by the State of the insurance of its citizens, but an arbitrary interference by one State with the rights

of citizens of other States. On the other hand, to sustain the contention made by the company in this case would deny to a State the full power to protect its citizens in respect to insurance, a power which has been long and beneficently exercised. For the power to protect will be seriously abridged, if it is held that the State of Missouri cannot constitutionally prohibit those who are its citizens and corporations within its jurisdiction from contracting themselves out of the limitations imposed by its legislature, in the exercise of the police power, upon the contracts actually made within the State. And unless it is so abridged, the Missouri nonforfeiture law, as applied to the facts of this case, cannot be held invalid.

Nor does *Allgeyer* v. *Louisiana*, 165 U. S. 578, furnish support to the company's contention. Allgeyer, a citizen and resident of Louisiana, had made in New York, with a corporation organized and doing business there, an open contract for marine insurance to cover cotton to be purchased and shipped. Shipments to be covered were required to be reported by letter addressed to the company at New York. Allgeyer mailed in Louisiana such a letter addressed to New York City. A Louisiana statute made it a crime for any one to do any act to effect insurance in any marine insurance company which had not established a place of business within the State and appointed an authorized agent upon whom process might be served. The insurance company there referred to had not been authorized to do business in Louisiana and actually did no business there. Allgeyer was sentenced for mailing the letter. This court held that the statute was unconstitutional as construed by the state court, because it denied to a citizen of the United States rights guaranteed by the Fourteenth Amendment.

But the case did not require the court to decide whether a State could prohibit its citizens from making contracts with corporations organized under the laws of and doing

business in another State; nor whether the contract there involved had been made in New York; nor whether it was valid. And it did not in fact decide any of those questions; for they were not in issue. It was admitted (*a*) that the contract there involved—the open insurance policy—had been made in New York and (*b*) that it was valid. The only question presented to this court was whether the State, in order more effectually to enforce its foreign corporations act, could prohibit its citizens from doing, within the State, certain acts which were essential to the enjoyment of rights secured by such a valid contract made without the State. In the paragraph near the close of the opinion (p. 593) this is pointedly expressed:

"In such a case as the facts here present the policy of the State in forbidding insurance companies which had not complied with the laws of the State from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the State and with reference to a company which is not doing business within its limits."

The more elaborate discussion which preceded this paragraph makes clear the ground of the decision.

"In the case before us the contract was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made." (P. 587.)

"In this case the only act which it is claimed was a violation of the statute in question consisted in sending the letter through the mail notifying the company of the property to be covered by the policy already delivered. We have then a contract which it is conceded was made

outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State. It was a mere notification that the contract already in existence would attach to that particular property. In any event, the contract was made in New York, outside of the jurisdiction of Louisiana, even though the policy was not to attach to the particular property until the notification was sent." (P. 588.)

"It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the State, any prohibition of the state statute to the contrary notwithstanding. The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State." (P. 592.)

Fourth: Furthermore, the right of citizens of the United States which the *Allgeyer Case* sustained "is the liberty of natural, not artificial persons." *Northwestern Life Insurance Co.* v. *Riggs, supra*, p. 255. While a State may not (except in the reasonable exercise of the police

power) impair the freedom of contract of a citizen of the United States, "it can prevent the foreign insurers from sheltering themselves under his freedom." *Nutting* v. *Massachusetts*, 183 U. S. 553, 558; *Phœnix Insurance Co.* v. *McMaster*, 237 U. S. 63. The insurance company cannot be heard to object that the Missouri statute is invalid, because it deprived Dodge of rights guaranteed to natural persons, citizens of the United States. *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 705; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576.

In my opinion the decision of the Springfield Court of Appeals should be affirmed.

MR. JUSTICE DAY, MR. JUSTICE PITNEY and MR. JUSTICE CLARKE concur in this dissent.